SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2023 0111

SAMUEL TESSA Applicant

v

THE KING Respondent

JUDGES:	BOYCE, ORR and T FORREST JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	14 May 2024
DATE OF JUDGMENT:	16 September 2024
MEDIUM NEUTRAL CITATION:	[2024] VSCA 204
JUDGMENT APPEALED FROM:	[2023] VCC 501 (Judge Hampel)

CRIMINAL LAW – Appeal – Conviction – Obtaining property by deception – Obtaining financial advantage by deception – Applicant falsely represented that he would provide or arrange insurance – Applicant knew he was not authorised or licenced – No inconsistencies or inadequacies in evidence.

CRIMINAL LAW – Appeal – Conviction – Applicant unrepresented – Applicant ignored and flouted trial judge's rulings – Applicant's cross-examination of witnesses, own evidence in re-examination and opening address terminated by judge – Applicant required by judge to participate in trial at times by audiovisual link from remote witness room – Applicant removed from courtroom and brief re-examination of one witness proceeded in his absence – Applicant taken by his behaviour to have waived his right to be present for witness's re-examination.

CRIMINAL LAW – Appeal – Conviction – Whether County Court had jurisdiction to hear charges – Whether jury selection subject to tampering – Whether judge erred in excluding evidence of alleged corruption of regulator – Whether 'question trail' given to jury was permissible – No error or irregularity.

CRIMINAL LAW – Appeal – Sentence – Applicant alleged error in calculation of sentence – Applicant alleged factual errors in sentencing remarks – No error.

Criminal Procedure Act 2009 ss 223, 235, 246, 330; *Evidence Act 2008* s 41; *Evidence (Miscellaneous Provisions) Act 1958* s 42M.

CNY17 v Minister for Immigration and Border Protection (2019) 268 CLR 76; *DPP v Smith* [2023] VSCA 293; *Eastman v The Queen* (1997) 76 FCR 9; *Johnson v Johnson* (2000) 201 CLR 488; *M v The Queen* (1994) 181 CLR 487; *O'Connell v Western Australia* [2012] WASCA 96; *Pell v The*

Queen (2020) 268 CLR 123; *R v Vernell* [1953] VLR 590; *Tessa v DPP (Cth)* [2022] VSCA 61.

Counsel

Applicant:	In person
Respondent:	Ms K Breckweg with Mr J Manning

Solicitors

Applicant:	
Respondent:	Mr S Bruckard, Solicitor for Public Prosecutions (Cth)

BOYCE JA

ORR JA

T FORREST JA:

Introduction

1 The applicant was charged with five charges of obtaining property by deception[1] and two charges of obtaining a financial advantage by deception.[2]

2 The applicant had approached five single operator panel beating and automotive businesses in Dandenong, representing himself to be an insurance broker with a business named Review Financial Services. Review Financial Services was a business name owned by Eastern Profits Pty Ltd, a company of which the applicant was the sole director and a shareholder.

3 The applicant offered to provide each of the business operators with business insurance. The business insurance was said to include public liability cover up to $5 million in some instances and up to $10 million in others. It was also said to include product liability cover of up to $5 million. Each of the operators accepted the applicant's offer to provide business insurance. One also accepted the applicant's offer to provide him with personal sickness insurance.

4 Each of the business operators periodically paid the applicant sums of money which they understood to be insurance premiums. Each received documents from the applicant purporting to be policy documents, as well as renewal notices and other correspondence in relation to their insurance.

5 The prosecution alleged that the applicant falsely represented to each of the individuals that the sums of money they provided would be used to pay for insurance, when they were not. The applicant was not licensed or authorised to arrange or provide insurance, and knew this to be the case. The policy documents and other documents were fake, and the purported provision of insurance was a scam.

6 The applicant represented himself at his trial, which was conducted in the County Court over 13 days. On 13 December 2022, the applicant was convicted of all charges. On 30 March 2023, he was sentenced to a total effective sentence of 2 years and 10 months' imprisonment.

7 The applicant seeks leave to appeal against his conviction and his sentence.[3]

8 As best we can discern from the material filed by the applicant,[4] the application for leave to appeal against conviction raises the following issues for resolution:

(a) Did the County Court have jurisdiction to hear the applicant's trial?

(b) Was the jury selection procedure the subject of tampering?

1 Contrary to s 81(1) of the *Crimes Act 1958*.

2 Contrary to s 82(1) of the *Crimes Act 1958*.

3 The applications were filed out of time, on 9 June 2023. On 24 October 2023, the applicant was granted an extension of time to file both applications.

4 The application principally comprises two affidavits deposed by the applicant, which annex multiple exhibits. The contents of the affidavits are discursive and sometimes difficult to follow.

(c) Did the judge err in excluding evidence and preventing the applicant from questioning witnesses about the alleged corrupt conduct of the Australian Securities and Investments Commission ('ASIC')?

(d) Did a question trail given by the judge to the jury omit relevant matters?

(e) Are the convictions unreasonable and unable to be supported by the evidence?

(f) Was the judge biased and did she take measures in response to the applicant's conduct during the trial that constituted an error or irregularity in the trial?

9 After providing an overview of the charges and the trial, we will address each of these issues in turn. We will then turn to the two proposed grounds in the application for leave to appeal against sentence.

Overview of the charges

10 Charge 1 (obtaining property by deception), charge 2 (obtaining financial advantage by deception) and charge 3 (obtaining financial advantage by deception) concerned the applicant's dealings with Mr Mohammed Atesh and his business Exotic Panels. Charge 1 covered a period of some five years. The prosecution alleged that the applicant obtained eleven cheques totalling $29,161.95 over this period, by falsely representing to Mr Atesh that they would be used to pay for business and sickness insurance. By charge 2 the prosecution alleged that the applicant obtained a credit in his Bendigo Bank account of $1,632.90 by falsely representing to Mr Atesh that it would be used to pay for sickness insurance. And by charge 3 the prosecution alleged that the applicant obtained a credit in his Bendigo Bank account of $1,226.80 by falsely representing to Mr Atesh that it would be used to pay for business insurance.

11 Charge 4 (obtaining property by deception) concerned the applicant's dealings with Mr Victor Harrison and his business Jada Engineering Pty Ltd. The prosecution alleged that over a period of more than three years, the applicant obtained from Jada Engineering 19 cheques totalling $42,752.80 by falsely representing to Mr Harrison that the cheques would be used to pay for business insurance.

12 Charge 5 (obtaining property by deception) concerned the applicant's dealings with Mr Peter Naughten and his business AAA Ace Auto Salvage. The prosecution alleged that over a period of more than four years, the applicant obtained from AAA Ace Auto Salvage 36 cheques totalling $12,261.75 by falsely representing to Mr Naughten that the cheques would be used to pay for business insurance.

13 Charge 6 (obtaining property by deception) concerned the applicant's dealings with Mr Waleed Hanna and his business Superban Auto Pty Ltd. The prosecution alleged that over a period of approximately three months, the applicant obtained two cheques totalling $1,451.60 by falsely representing to Mr Hanna that the cheques would be used to pay for business insurance.

14 Charge 7 (obtaining property by deception) concerned the applicant's dealings with Mr Ercan Cakular and his business Elite Auto Refinishing. The prosecution alleged that over a period of close to two years, the applicant obtained seven cheques totalling $5,963.90 by falsely representing to Mr Cakular that the cheques would be used to pay for business insurance.

15 In total, the prosecution alleged that the applicant received and applied to his own use cheques and bank transfers to the value of $94,451.70.

16 Mr Atesh and Mr Harrison made no claim on their purported insurance policies. Following a storm that flooded his business premises, Mr Naughten enquired about whether his policy covered damage to his items. The applicant told him that the policy coverage did not extend to flood damage.

17 Both Mr Hanna and Mr Cakular made claims on their policies following theft of items from their business premises. Mr Hanna's claim was ultimately declined. Mr Hanna's attempts to speak with the applicant were unsuccessful. The applicant did not seek further payments from Mr Hanna, who subsequently received a letter from Review Financial Services advising that his policy had been cancelled from its inception due to an alleged failure by Mr Hanna to provide documents and that premiums paid under the policy would be refunded. The letter attached a cheque for $1,451.60.

18 Following Mr Cakular's claim, Mr Cakular received requests from the applicant for various information and material. Mr Cakular sought, but did not receive, a copy of the product disclosure statement for his policy and information about the identity of the underwriter. His claim was ultimately refused. He received a cheque for $1,777.30, which was described as a refund of premiums.

The trial

19 Each of the complainants gave evidence, as did eleven other witnesses. A large body of documentary evidence was also tendered.

20 The key issues in dispute were whether the applicant had obtained the 'premium' payments from each of the complainants by engaging in deception, and whether he had done so dishonestly, in the sense that he had no belief that he was legally entitled to the payments.

21 The prosecution case as to the first of these issues was that the applicant had engaged in deception because he had told each of the complainants that he was arranging for and providing them with insurance, when he was not in fact doing either of those things. His business was a sham. The paperwork that he gave to the complainants contained details that were designed to give the impression of a legitimate insurance business, but those details were fake. At most, the applicant had only two employees, who were part-time bookkeepers. Neither he nor his company had the capacity to pay out any substantial insurance claim. The claims made by Mr Hanna and Mr Cakular were refused on spurious grounds. The vast majority of the total amount that the applicant received in payments from the complainants had been withdrawn from his bank account in ATM transactions, rather than kept in reserve.

22 The prosecution led evidence as to the regulatory environment in the insurance industry. That evidence established that insurance brokers, being individuals who *arrange* insurance, require an Australian Financial Services Licence ('AFSL') from ASIC. Companies who *provide* insurance must be authorised to carry out an insurance business by the Australian Prudential Regulation Authority ('APRA'). The prosecution case was that the applicant would have been aware of these requirements, given that he had worked in the insurance industry for more than 30 years. Indeed, there could be no doubt that he knew of the requirement to obtain an AFSL, because he had unsuccessfully applied to ASIC for an AFSL on at least two occasions. At all relevant times he had no AFSL and his company was not authorised by APRA to provide insurance.

23 The prosecution case as to the second issue, whether the applicant had obtained the payments from the complainants in circumstances where he had no belief that he was legally entitled to the payments, relied on the same evidence. The prosecution case was that the applicant had no genuine belief that he was entitled to be paid 'premiums' because he knew that he was not operating a legitimate insurance business, and that he did not have the necessary licence and authorisation to do so.

24 In response, the applicant said he had not engaged in deceptive conduct and did not dishonestly obtain the payments. He had provided each of the complainants with insurance, which was underwritten by Review Financial Services. Mr Hanna and Mr Cakular's claims were rejected for legitimate reasons. Legitimate claims made by other customers had been honoured and paid. He did not know that to act as an insurer he needed to seek authorisation from APRA. He had made multiple applications to ASIC for an AFSL, and when he had no response from ASIC to the last of these applications, he believed it had been approved. He believed that an AFSL was an 'insurance licence', which authorised him to arrange and provide insurance.

25 As will become clear, the applicant's applications to ASIC for an AFSL assumed some prominence in the trial. The applicant contended that he had made four applications: one in 2004, one in November 2005, one in February 2006, and one on 12 October 2006. For the purposes of the trial, the critical application was the one said to have been made on 12 October 2006. The applicant said that this last application, which followed a series of unsuccessful applications, had been accompanied by correspondence in which he offered to provide any additional documents that ASIC required. The applicant's case was that although ASIC had advised him that his previous applications had been refused, he had no response from ASIC to the last application, and therefore assumed that application had been approved. The prosecution case was that ASIC had not received an application from the applicant on or around 12 October 2006, and that he had made no such application. The prosecution said that even if the applicant had made an application on or around this date, it was implausible that having heard nothing in response to that application, he would assume that it had been approved.

26 A related issue was whether the applicant requested and received a refund of an AFSL application fee in the amount of $270, which he had paid in February 2006. ASIC's policy was that applicants who were unsuccessful in applying for an AFSL could have their application fee applied to any future ASFL application they submitted. The prosecution adduced evidence that on 22 November 2006, the applicant had spoken by telephone to an ASIC employee named Linda Jones and requested a refund of his AFSL application fee; that on 12 December 2006, ASIC had issued a cheque for $270 in the applicant's favour; and that on 18 December 2006, the applicant had banked the cheque. The applicant denied requesting or receiving such a refund.

27 The final matter that bears mentioning at this point is the applicant's attempt to adduce evidence to support an allegation that ASIC as an organisation was corrupt. Relying on a public report about remuneration payments that had been made to certain senior executives at ASIC in 2018 and 2019, the applicant alleged that such payments were improper, that they had been covered up by ASIC, and that the ASIC records and the evidence given by ASIC witnesses in the trial therefore lacked credibility and, indeed, were fraudulent. The judge disallowed the applicant from adducing evidence in support of his allegation of corruption on the basis that such evidence was irrelevant to the issues in the trial. We return to the applicant's allegation of corruption below.

Issue (a): Did the County Court have jurisdiction to hear the charges?

28 Although the applicant abandoned a foreshadowed application to have his charges heard in the Magistrates' Court at the outset of the trial, the applicant now contends that the charges should have been heard in the Magistrates' Court because the total value of the property or financial advantage he was alleged to have obtained was under $100,000.

29 The applicant appears to have mistaken the jurisdictional limit of the Magistrates' Court in a civil proceeding, being cases where no more than $100,000 is claimed for a cause of action,[5] for the criminal jurisdiction of the County Court.

30 Section 36A(1) of the *County Court Act 1958* vests in the County Court jurisdiction to hear all indictable offences, with certain exceptions. The offences with which the applicant has been charged are indictable offences that do not fall within any of these exceptions. Accordingly, the County Court had jurisdiction to hear the charges against the applicant.

31 The applicant's contention on issue (a) therefore fails.

Issue (b): Was the jury empanelment procedure subject to tampering?

32 The applicant contends that the empanelment of the jury was affected by error, because it was done by the judge's associate 'in sequence by the hand and not from the ballot box'.

33 Having reviewed the jury empanelment footage, we are not satisfied that there is any evidence that the selection of the jury was as the applicant asserts.

34 The applicant's contention on issue (b) therefore fails.

Issue (c): Did the judge err in excluding evidence about alleged ASIC corruption?

The allegation of corruption

35 In short compass, the applicant alleged that improper remuneration payments were made on behalf of ASIC's chair, James Shipton, and deputy chair, Daniel Crennan, in the 2018–2019 and 2019–2020 financial years. The applicant said these payments were detailed in a confidential report by Vivienne Thom provided to the Commonwealth Treasury on 17 December 2020, but they were then covered up in an abridged version published on 28 January 2021 (the 'Thom Report'). The payments, and the cover up, were said to support the applicant's contention that he had applied for an AFSL in October 2006 and that ASIC had covered up that application; as well as a contention that ASIC had fabricated documents showing that it had, upon the applicant's request, refunded his AFSL application fee in 2006. As we have said, the allegedly corrupt conduct of ASIC was also said to affect the credibility of ASIC witnesses and documents.

Subpoenas

36 To support his submissions on these matters, the applicant caused three subpoenas to be issued prior to trial. The first was directed to the author of the Thom Report, Vivienne Thom. The second was directed to the Commonwealth Auditor-General, Grant Hehir. Mr Hehir had taken action that led to the commissioning of the Thom Report, by writing to the

5 *Magistrates' Court Act 1989* ss 3(1) (definition of 'jurisdictional limit'), 100(1)(a)–(b).

Commonwealth Treasurer in 2020 outlining concerns with payments made on behalf of Mr Shipton and Mr Crennan that had been identified during an audit of the 2019–20 financial statements of ASIC. The third subpoena was directed to a journalist who had written about the events involving Mr Shipton and Mr Crennan, Anthony Klan. Each subpoena was returnable on 22 February 2022.[6]

37 On 23 February 2022, the judge ruled that the subpoenas had not been validly served. She set each of them aside.[7]

38 On 28 February 2022, the judge allowed the applicant to issue new subpoenas to Dr Thom, Mr Hehir and Mr Klan, returnable on 14 June 2022. Around this time, he issued a further subpoena to the Secretary of the Treasury, Steven Kennedy. Dr Kennedy had appointed Dr Thom to conduct the independent review that resulted in the Thom Report.

39 On 23 May 2022, the judge heard an application by Dr Thom, Mr Hehir and Dr Kennedy to set aside the subpoenas addressed to them.

40 On 3 June 2022, the judge set aside the subpoenas to Dr Thom, Mr Hehir and Dr Kennedy on the basis that the evidence the applicant sought to adduce through them was irrelevant.

41 On 23 November 2022, the day before the trial was to commence, the applicant sought to make submissions about the subpoena to Mr Klan, which had not been set aside, and had not been answered. He said the Court had the power to make Mr Klan appear because he had been subpoenaed. The judge invited the applicant to consider whether he wished to make some form of application.

42 The issue was raised again the following day. The judge told the applicant that she would defer considering any application in respect of the subpoena to Mr Klan until towards the end of the prosecution case. However, she observed that any application to enforce the subpoena could involve consideration of whether the evidence sought to be adduced from Mr Klan was relevant to the issues in the trial. She told the applicant to review her ruling setting aside the subpoenas to Dr Thom, Mr Hehir and Dr Kennedy.

43 On Friday 2 December 2022, the judge indicated that she proposed to deal with any application in relation to the Klan subpoena the following Monday. The applicant said he was relying on the subpoena and what was stated in the subpoena.

44 At the end of the day on Monday 5 December 2022, the judge said the subpoena would be dealt with the next day. She again invited the applicant to review the ruling she had made setting aside the subpoenas to Dr Thom, Mr Hehir and Dr Kennedy on the basis that the issues relating to Mr Shipton and Mr Crennan were irrelevant to the issues in the trial.

45 The subpoena was not dealt with until 7 December 2022. On that day, the judge invited the applicant to make submissions. The applicant said that a subpoena had been issued and had not been answered, and he was ‘simply asking’ the court to ‘follow what the subpoena states’. When asked about the topics on which he wanted to examine Mr Klan, the applicant declined to answer, asserting a right not to disclose the questions he was going to ask. He said that all that needed to be done was for the law to be exercised in accordance with the subpoena.

46 The judge refused to take any action to secure the attendance of Mr Klan. She noted that in

6 We have only been provided with a copy of the subpoena that was directed to Mr Klan.

7 The subpoenas had not been served personally, and they had not been served with conduct money.

material previously submitted by the applicant, he had said he sought Mr Klan's attendance to question him about payments to Mr Shipton and Mr Crennan. She said 'the time for Mr Klan to respond and to appear in response to the subpoena was many months ago [the date of return being 14 June 2022]', and no issue was taken with his non-appearance at that time, nor on 3 June 2022 when she set aside the subpoenas to Dr Thom, Mr Hehir and Dr Kennedy. She said the applicant had delayed in applying for any action to be taken in relation to Mr Klan, and had declined to indicate any basis upon which the evidence was admissible.

47 In the hearing in this Court, the applicant's submissions about the subpoenas focused on the subpoena to Mr Klan. The applicant said that because Mr Klan was living interstate at the time of the trial, he would have appeared by video link. He said that although he had 'submitted' the subpoena and done everything 'correctly' in terms of procedure, the court had not arranged any video link. When asked in this Court to identify the forensic point that he sought to make through Mr Klan, the applicant read from an article written by Mr Klan following the announcement of the review that resulted in the Thom Report. The article quoted publicly available information about the circumstances leading to the review. The applicant said:

> I mean, every single person in this room is a taxpayer, and you've got a regulator who is supposed by regulating, is allowing fraud going on in the internal — internally. I mean it's — and yet they're pointing fingers at a small business accusing them of doing wrong, when they are doing wrong themselves internally and then covering everything up.

Consideration

48 We see no error in the judge's decisions to set aside the bulk of the subpoenas on the ground of irrelevance and to refuse to take action to secure Mr Klan's attendance at trial in response to the subpoena directed to him.

49 The payments dealt with in the Thom Report, and the issues canvassed in the report in connection with those payments, occurred more than a decade after the applicant says he submitted an AFSL application in October 2006. As we have said, the Thom Report concerned certain remuneration payments made to high-ranking officers in ASIC. It examined the procurement and governance processes around the payments. These matters had little to do with ASIC's regulatory functions, and indeed, nothing to do with the applicant's case. Further, nothing in the Thom Report suggests that any ASIC personnel engaged in any cover up or otherwise in any corrupt or fraudulent conduct, let alone any ASIC personnel connected with the applicant's case. The high point of the Report for the applicant appears to be at page 37, where Dr Thom said:

> On the face of the findings in this report, the actions of some ASIC officials involved in providing the information for, preparing, or oversighting the quality and accuracy of briefings, submissions and legal advices may be open to question. ASIC may wish to consider whether these matters are indicative of a possible lack of quality assurance and consider whether additional controls should be introduced to ensure accuracy in their legal advising processes.

50 The Thom Report, the commissioning of the Thom Report and the reporting by Mr Klan on the events connected to the Thom Report were irrelevant to the facts in issue in the prosecution of the applicant.

51 As to the applicant's complaints about the way the judge dealt with the Klan subpoena, the applicant appears to have been under a misapprehension that the issuing of a subpoena to a witness was itself sufficient to compel the attendance of the witness. However, the judge explained to the applicant on multiple occasions that he would need to persuade her of the relevance of the evidence sought to be adduced from Mr Klan. The applicant refused to do so. He was also unable to do so in this Court.

52 The applicant's contentions on issue (c) therefore fail.

Issue (d): Did the question trail omit relevant matters?

53 The applicant submits that a written 'question trail' that was given to the jury to assist in their deliberations was deficient because it only addressed uncontested issues, was prepared or supplied by the prosecution, and did not address certain contested facts, including 'regulators dishonesty' and 'all genuine claims been honoured/paid/settled'. He submits that the question trail 'funnelled' the jury into an unjust verdict.

54 The complaints about the question trail misunderstand the function and purpose of the document.

55 A trial judge is empowered by s 223(1)(ka) of the *Criminal Procedure Act 2009* (the '*CPA*') to give a 'jury guide specific to the trial' to the jury for 'the purpose of helping the jury to understand the issues or the evidence'. Pursuant to s 223(1A)(a), 'a jury guide specific to the trial' may include a list of questions to assist the jury in reaching a verdict, including questions that are included in integrated directions within the meaning of s 67 of the *Jury Directions Act 2015*.

56 Section 67(2) of the *Jury Directions Act* provides that such questions are 'factual questions that address matters that the jury must consider or be satisfied of in order to reach a verdict, including the elements of the offence and any relevant defences'.

57 Here, what the jury needed to be satisfied of in order to reach a verdict were the specific factual contentions of the prosecution in relation to the elements of each offence. As the judge rightly identified, including the applicant's factual contentions, such as 'did the accused have a 100 per cent belief that he was acting correctly and lawfully?', and 'did ASIC have an integrity problem?', would have risked reversing the onus of proof, such that if the jury gave a 'no' answer to any of those questions, they might be inclined to foreclose other reasons why the applicant might not have been guilty of the charges.

58 The question trail set out the prosecution's factual contentions in relation to the elements, acceptance of each of which was necessary for the jury to convict. It was in similar terms to question trails seen in other cases in this Court.[8] For example, in respect of charge 1, the first question was: 'Has the prosecution satisfied you beyond reasonable doubt [that] Samuel Tessa obtained 11 cheques totalling $29,161.95 drawn on the account of Exotic Panels made out to Review Financial or Review Financial Services, from Mohammed Atesh'. It provided 'If yes -> go to 1.2; If no, Not Guilty of charge 1 -> go to charge 2'.

59 The question trail permitted the jury to convict only if they answered 'yes' to each question of whether the prosecution had satisfied them of a certain factual contention beyond reasonable doubt. Far from 'funnelling' the jury into a guilty verdict, the question trail provided for a not

[8] See, eg, *Taylor v The Queen* (2019) 59 VR 163, 183–8 [83]–[90] (Priest and Beach JJA); [2019] VSCA 162.

guilty verdict at every juncture — if the jury answered 'no' to any of the factual contentions, the document made clear that a not guilty verdict would result.

60 There is no merit in the applicant's contention that the question trail was prepared or supplied by the prosecutor. The question trail was created by the judge, and a draft copy was provided to the applicant and the prosecutor in advance of it being provided to the jury. Both parties were invited to make submissions on the question trail. The applicant made substantially similar submissions to those he makes in this Court. The judge rejected those submissions on the basis that including the questions he proposed would have risked placing an onus on him to prove his innocence.

61 For the reasons we have set out above, there was no error in that reasoning. The applicant's contentions on issue (d) therefore fail.

Issue (e): Is the verdict unreasonable and unable to be supported by the evidence?

Applicant's submissions

62 There were two parts to the way the applicant framed his contention that the verdicts are unreasonable and cannot be supported by the evidence. First, the applicant relies on 11 key documents, which are said to demonstrate various inconsistencies or inadequacies in the evidence adduced by the prosecution, or to support the applicant's version of events. Second, the applicant relies on a series of other matters that are said to demonstrate that the verdicts are unreasonable.

63 We start our consideration of the applicant's submissions by identifying the 11 key documents. The first is an internal ASIC document entitled 'Referral to Enforcement' prepared by a member of ASIC's Compliance – Financial Services team, Adam Coleman, on 3 August 2006 (the 'Referral'). The Referral contained certain redactions made by the prosecution. The unredacted portions contained a recommendation that 'the Enforcement Directorate take action' against the applicant in order to protect clients from unlicensed dealing. The unredacted portions of the document also included the following:

> Premjeet Gill of NA&A wrote to Tessa on 21 October 2004 expressing concern that Tessa may be operating a financial service business without being duly licensed. Tessa responded in writing on 1 November 2004 and 5 November 2004 (in response to a telephone discussion with Premjeet Gill) and had telephone discussions with Premjeet Gill on 5 November 2004 and 28 January 2005.
>
> In his first letter, dated 1 November 2004, Tessa stated that he had made an application for an AFSL, and that he was an authorised representative of Deakin Financial Services Pty Ltd (AFSL: 231159) ('Deakin'). This was not corroborated by searches of ASIC databases at the time, and denied by Derek Russell of Deakin in a telephone discussion with Premjeet Gill on 28 January 2005.

64 The applicant says this portion of the Referral misrepresented the letter in question, in which he said he had obtained certification through Deakin Financial Services Pty Ltd, rather than being an authorised representative of that entity.

65 The applicant also complains about the fact that the Referral was redacted, which he

contended amounted to tampering with evidence. The Referral was redacted to ensure that the jury did not receive prejudicial material, including about the applicant's prior convictions. That material had been before the jury in an earlier trial in respect of the charges, resulting in that first trial aborting.

66 The second document is a letter dated 12 October 2006 from Review Financial Services to ASIC, said by the applicant to have been sent to ASIC with an AFSL application attached. The letter is signed by the applicant, and invites ASIC to advise if it requires 'any other documents/information or if there any [sic] issues'. The applicant says this document shows he lodged an application on this date, cooperated with ASIC, offered to provide any necessary documents, and sought a response. In the absence of any response, he believed everything had been approved.

67 The third document is an email dated 19 July 2006 to ASIC from Daniela Kirchlinde, a former compliance manager at Insurance Brokers Disputes Ltd ('IBD'), in which Ms Kirchlinde conveyed the following concerns about the applicant:

> • He applied for IBD membership in February 2005 ($660) and renewed for 2006 ($550) without actually having a valid [AFSL] application or licence;
>
> • He only has a mobile telephone number as contact number and appeared reluctant to confirm his name when we contacted him,
>
> • He stated to us that ASIC was still assessing his application and did not mention that his applications failed pre lodgement.

68 The document predates 12 October 2006, when the applicant says he submitted the critical AFSL application. The applicant relies on Ms Kirchlinde's statement in the document that '[h]e only has a mobile telephone number as contact number'. He says this statement demonstrates that evidence given at trial by Glenn Childs, who conducted an investigation of the applicant in 2006, was dishonest. The evidence of Mr Childs was that he had spoken to the applicant in November 2006 on a particular landline number. The applicant says that the particular number was not a phone number, but a fax number, which he provided in the AFSL application that he submitted to ASIC on 12 October 2006.

69 The fourth document is the Thom Report. The applicant said he did not have access to the full confidential version of the report, but that it was clear the abridged report involved a 'cover up' because, for example, various ASIC officers referred to in the report were not identified by name.

70 The fifth document is the article by Anthony Klan to which we have earlier referred, in which Mr Klan reported on the announcement of the review that resulted in the Thom Report, and quoted from various publicly available information about the circumstances leading to the commissioning of the review.

71 The sixth document is a bank statement in relation to an ASIC bank account, generated by an employee of Westpac Banking Corporation ('Westpac'), Ambar Dasgupta. It shows withdrawals of various amounts between 21 November 2006 and 19 January 2007. The statement records that on 18 December 2006, a cheque numbered 660289 for $270 was drawn on the account. The prosecution's case was that cheque 660289 was issued to the applicant as a refund of the application fee associated with one of the applicant's unsuccessful AFSL applications, and that the cheque had been presented and the funds withdrawn. The

applicant contended that there was no evidence on the bank statement of to whom cheque 660289 had been issued. He says he wanted, but was not permitted, to put to Mr Dasgupta at trial that it was impossible that between November 2006 and January 2007 ASIC issued at least 50 refunds of licensing fees, as indicated by the number of withdrawals in the sum of $270 that appear on the statement.

72 The seventh document is an internal ASIC refund request form dated 23 November 2006, which the applicant described as 'supposedly ASIC's … document proof of refund'. The 'Refund Amount' recorded on the document is $270 and the 'Account Name' is 'Eastern Profits Pty Ltd'. The 'Staff Member who has investigated and recommends the refund' is recorded as Linda Jones. The document records, under 'Reason For Refund':

> Eastern Profits Pty Ltd applied for an AFS licence earlier this year that was pre lodge failed. Mr Tessa called me on 22/11/2006 to request ASIC refund his AFS licence application fee that ws [sic] paid or transferred to the above account on 15/02/2006.
>
> …
>
> It appears that Mr Tessa will not be applying in the near future for an AFS licence.
>
> I am unable to provide the actual cheque details for Eastern Profits Pty Ltd

73 The applicant says the form is fraudulent because there is no logo on it, no 'responsible officer' is listed, no cheque number is listed, no account number (of the recipient of the refund) is listed, and the document suggests a refund was approved based on a phone call, which is contrary to proper procedure. The applicant contrasts the information in the form with an ASIC web page which tells applicants who seek a refund to contact ASIC online, and to include various details, such as proof of payment. He also contrasts the information on the form with the type of information required by a document he refers to as a 'refund manual', which appears to be a screenshot of a screen produced by internal ASIC software, requiring various details to be filled out.

74 The eighth document is a letter from the Commonwealth Director of Public Prosecutions (the 'CDPP') to the applicant's former solicitor, in which the CDPP said that the ASIC informant had advised that phone calls to the ASIC licensing team were not recorded or transcribed in 2006. The applicant says this advice is contradicted by the existence of short form notes which Ms Jones made of phone calls she had with the applicant on 17 February 2006 and 20 February 2006.

75 The ninth document is an email chain between the Commonwealth Bank of Australia (the 'CBA') and ASIC in relation to a notice issued by ASIC in 2020. The notice appears to have required the production of records pertaining to a particular CBA bank account said to have been held in the applicant's name. In the emails, the CBA representative advised that she had been unable to locate any account with the account number provided and that no further trace information was available for the transaction date required by the notice (which appears to have been a date connected with the refund of the AFSL application fee). The applicant says that this letter demonstrates that ASIC could not have refunded him his AFSL application fee because it did not have his account number, and there has therefore been a cover up.

76 The tenth document is an internal ASIC email chain dated 4 January 2006 in which an analyst

told an assistant director from the Financial Services Licensing team that he had noticed that Eastern Profits Pty Ltd had a licence pending, that he had had dealings with Eastern Profits as part of a campaign conducted by Compliance last year and that he would have 'serious concerns' if an AFSL was granted to Eastern Profits. The assistant director, in reply, said he would upload the analyst's email against the applicant's file 'in case they [the applicant] try again'. The applicant says this email exchange shows that ASIC's position was:

> Don't do anything with this application anymore. We're not going to do anything about it.

77 The final document is a document entitled 'Questions Regarding Admissions' dated 1 September 2020. Before the trial, the Court had ordered that the CDPP prepare a statement of admissions, requesting a 'Yes' or 'No' answer from the applicant to various questions of fact. The applicant amended the statement by adding questions of his own, which appear to be designed to identifying inadequacies and inconsistencies in the evidence, and writing exculpatory answers next to them. The judge disallowed the tender of the amended statement. The applicant complains about that disallowance.

78 The other matters that the applicant relies on to demonstrate that the verdicts are unreasonable are as follows.

79 First, the applicant refers to the evidence of Mr Childs that he was investigating the applicant in 2006 and that he had served the applicant with a 's 33 Notice' (a notice issued under the *Australian Securities and Investments Commission Act 2001* (Cth) requiring the recipient to produce certain records). The applicant says there was no record of such an investigation in the ASIC internal referral document, which was 'a full history of dealings with ASIC'. In cross-examination, the applicant asked Mr Childs why the s 33 Notice had not been adduced in evidence. Mr Childs replied: 'perhaps it wasn't seen as being relevant to the disclosure process'. The applicant says this proves the s 33 Notice never existed.

80 Secondly, the applicant points to his evidence that he had reason to believe that some of his insurance customers were in breach of their duty of disclosure to him. He says that notwithstanding this, he refunded certain customers (Mr Hanna and Mr Cakular) their premiums. He says Messrs Naughten, Harrison and Atesh were happy with his service.

81 Thirdly, the applicant says the CDPP also seized and failed to adduce exculpatory evidence, such as evidence of other customers whose claims the applicant had paid out.

82 Fourthly, the applicant points to the same evidence said to bear on ASIC's integrity that he relies on in relation to issue (c), including the evidence that he wished to adduce from Mr Klan.

83 Finally, the applicant asserts that there was no evidence that he had obtained the payments from the complainants dishonestly — that is, there was no evidence that he had obtained those payments knowing that he had no legal right to do so.

Respondent's submissions

84 The respondent submits that on the whole of the evidence at the trial, it was open to the jury to convict. The respondent emphasises that much of the evidence was not in dispute. The applicant did not contest that he had made representations offering to arrange or provide insurance to the five complainants, that he received cheques or transfers of money from the

complainants in purported satisfaction of insurance policy premiums, or that he had provided renewal documents to the complainants.

85 The evidence also established that each of the payments made by the complainants were made into a bank account in the name of the applicant, trading as Review Financial Services, for which the applicant was the sole signatory. A senior financial investigator at ASIC traced the funds in the account and gave evidence that nearly all the funds in the account were withdrawn by the applicant from ATMs.

86 The central issues in dispute were whether the applicant's conduct in representing to the complainants that their 'premiums' would be used to pay for insurance was deceptive, and whether the applicant had dishonestly obtained those payments. In the respondent's submission, the evidence as to these matters was overwhelming. In particular, the evidence was said to establish the following:

(a) the applicant was never licensed to act as an insurance broker, having never held an AFSL issued by ASIC;

(b) the applicant was aware of the requirement that he hold an AFSL to conduct his business, as demonstrated by the unsuccessful applications he made for an AFSL in 2005 and 2006;

(c) neither Review Financial Services nor Eastern Profits was authorised by APRA to provide insurance;

(d) the 'broker registration number' that appeared on the business card the applicant handed to three of the complainants did not reflect any registration, licence or permission for the applicant to operate as an insurance broker, but instead came from a document relating to the business name of Review Financial Services;

(e) the applicant could not recall what the post-nominal letters on his business card (and a letter sent to one of the complainants) stood for, other than representing a course he completed at Deakin Financial Services;

(f) the 'adviser ID number' that was recorded on a renewal notice given to one of the complainants was said by the applicant to be an internal number for himself as part of Review Financial Services, which comprised the same last four digits as the 'broker registration number' he used;

(g) Eastern Profits had no staff beyond two part-time bookkeepers, who the applicant refused to identify and said were not 'on the books' — the applicant said these staff sometimes came in weekly or fortnightly depending on what the applicant wanted, and together with the applicant, they also looked after the role of Dispute Resolution Officer;

(h) when Mr Atesh asked the applicant who was providing the insurance, the applicant told him not to worry, and that if he had any problems, he was to contact the applicant;

(i) when Mr Hanna asked the applicant if there were more policy documents, the applicant told him he did not need them and that the business tried to be environmentally friendly by not printing lots of pages;

(j) the applicant told Mr Harrison that he was the insurer, and when Mr Harrison pointed out that the applicant's business card identified him as a broker, the applicant told him not to worry about it;

(k) when Mr Harrison asked the applicant for a product disclosure statement, the applicant told him that his company was 'cutting down on paperwork' for ecological reasons; and

(l) the applicant did not respond to written requests by Mr Cakular or by Mr Hanna's lawyers for the identity of the underwriter of their policies, did not return Mr Hanna's calls and stopped attending on Mr Hanna to collect payments of premiums.

Consideration

87 In order to succeed in having his convictions overturned on the basis that they are unreasonable and cannot be supported by the evidence, the applicant must demonstrate that it was not open to the jury to be satisfied beyond reasonable doubt of his guilt.

88 In *M v The Queen*, Mason CJ, Deane, Dawson and Toohey JJ said:

> Where … a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[9]

89 And in *Pell v The Queen* the High Court said:

> The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment — either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence — the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.[10]

90 In our view, it was open to the jury, acting rationally, to be satisfied to the criminal standard that the applicant was guilty of each of the charges. We agree with the prosecution that there was overwhelming evidence that the applicant had falsely represented to each of the complainants that he was providing them with insurance, that the purported provision of the insurance was a sham, and that the applicant had dishonestly obtained the payments from each of the complainants.

91 We do not accept that any of the eleven documents relied on by the applicant gives rise to any inconsistencies or inadequacies that meant that the jury, acting rationally, could not have been satisfied of the applicant's guilt.

92 We deal with each document in turn.

9 (1994) 181 CLR 487, 493; [1994] HCA 63 (citations omitted).

10 (2020) 268 CLR 123, 145 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12 (citations omitted).

93 To the extent that the first document, the Referral, misrepresented that the applicant had stated in his letter dated 1 November 2004 that he was an authorised representative of Deakin Financial Services Pty Ltd (rather than that he had obtained a qualification through that entity), that misrepresentation was of no moment.

94 The Referral was tendered at trial by the applicant — seemingly to support his contention that he had applied for an AFSL in 2004, given that this application was referred to in his letter to ASIC dated 1 November 2004, which in turn was referred to in the Referral. The prosecutor did not rely on the statement in the Referral that the applicant had told ASIC that he was an authorised representative of Deakin Financial Services. There was no attempt to impugn the applicant's credibility by reference to that statement.

95 Taking the applicant's argument at its highest, if the author of the Referral had indeed misrepresented what the applicant said in his 1 November 2004 letter, then the 'searches of ASIC databases' referred to in the Referral may have failed to reveal the existence of an AFSL application he had made in 2004, because the searcher would have been looking for an application from a representative of Deakin Financial Services Pty Ltd, which the applicant was not.

96 However, even if that is so, whether or not the applicant submitted an AFSL application in 2004 was ultimately immaterial to the issues in the trial. It was not in dispute that the applicant had submitted AFSL applications in November 2005 and February 2006. The submission of those two applications necessarily meant that the applicant knew any application he had made in 2004 had not been approved. The thrust of the prosecution case was that it was implausible that the applicant would believe he was licensed in the face of ASIC's response (or lack of response) to his applications, whether that be an explicit rejection of his February 2006 application, or silence in response to the application he said he had made in October 2006.[11] That case was not affected by whether or not the applicant had also applied for an AFSL in 2004.

97 Further, the redactions made by the prosecution to the Referral did not amount to tampering. They were made to prevent the jury from seeing inadmissible evidence that had caused the first trial to miscarry. In other words, they were made to ensure that the trial was fair, rather than to render it unfair. The applicant did not identify any redacted content that he said should have been admitted in evidence.

98 The second document is the covering letter that the applicant is said to have sent to ASIC when supplying the AFSL application said to have been made in October 2006, in which he offered to provide any further necessary documents in support of the application. This document was also before the jury, and the applicant referred to it in his evidence-in-chief as 'self-explanatory'. However, as we have explained, the prosecution case was that even if ASIC had received such an application (and such a letter), it was implausible that having received no response, the applicant would interpret that silence as meaning he was licensed. We do not regard the existence of this document as precluding a jury from being satisfied of the applicant's guilt.

99 The third document, the email from Ms Kirchlinde about the applicant only providing a mobile phone number to IBD, was also before the jury, who were able to use it in their

[11] Indeed, it was clear that the prosecutor did not think it important whether there was an application in 2004 or not. When cross-examining the applicant the prosecutor said the applicant 'seems' to have made an application in 2004. In closing, the prosecutor said the applicant 'possibly' made an application in 2004.

evaluation of the honesty of the evidence of Mr Childs that he spoke to the applicant on a landline. We do not accept that the document required the jury to treat Mr Childs as dishonest. As the prosecutor noted, it was possible for the applicant to have a landline and fax machine at the same number, in addition to the mobile number he was said to have provided to IBD. So much is borne out by the header of applicant's own letter to ASIC of 1 November 2004 (which he uses to impugn the first document, the ASIC referral):

> **Review Financial Services**
>
> …
>
> Telephone (03) 9531 68 43 Facsimile (03) 9531 68 43

100 The fourth document, the Thom Report, does not assist the applicant. As we have explained above, it dealt with matters that had no bearing on the charges. In particular, the fact that the Thom Report does not provide the names of various ASIC officers referred to in the report does not, in our view, establish any sort of 'cover up' that was capable of rationally bearing on the jury's assessment of whether the applicant was guilty of the charges.

101 For the same reasons, the fifth document, the article by Anthony Klan to which we have earlier referred, does not assist the applicant. The matters on which Mr Klan reports in the article, being the announcement of the review that resulted in the Thom Report, and the circumstances leading to the commissioning of the review, were not capable of rationally bearing on the jury's assessment of whether the applicant was guilty of the charges.

102 The sixth document, the Westpac bank statement that the prosecution used to show that cheque 660289 was drawn from ASIC's bank account, also does not assist. The applicant was correct that the bank statement did not establish to whom the relevant cheque was issued. However, that evidence came from an ASIC employee, AnnMaree Dormer. Ms Dormer gave evidence that ASIC's records showed that a cheque numbered 660289 for $270 had been generated on 12 December 2006 in favour of Eastern Profits Pty Ltd as a refund of an AFSL application fee.

103 As for the applicant's contention that he was deprived of an opportunity to put to Mr Dasgupta that it was impossible that between November 2006 and January 2007, ASIC issued at least 50 refunds of licensing fees, the contention he sought to advance by this line of cross-examination (which he yelled out to the jury as the judge told him to stop speaking) was that ASIC was repeatedly sending money between its own bank accounts to generate the transactions on the statement. Whether that was so was not something that Mr Dasgupta, with the bank statement before him, could shed light upon. In any event, the applicant was permitted to present this contention in his closing address.

104 The alleged deficiencies in the seventh document, the refund request form, are illusory. That there was no logo on the form did not compel a conclusion that this document was fraudulent. That the form does not list the applicant's bank account number does not mean a cheque could not have been issued in the applicant's name. As to the contention that there was no 'responsible officer' listed, the form records that the staff member who investigated and recommended the refund was Ms Jones.

105 It does not follow from the ASIC web page inviting applicants seeking a refund to contact ASIC online and to provide proof of payment that refunds could *only* be requested or processed online, and not by telephone. And the document that the applicant referred to as a 'refund manual' did not compel any conclusion that the refund request form completed by

Ms Jones was fraudulent. Indeed, the interface in the screenshot lacked many of the fields (such as the recipient's bank account number) that the applicant claimed were essential to make a refund.

106 As to the eighth document, the letter from the CDPP to the applicant's former solicitor, the statement in that letter that phone calls to the ASIC licensing team were not recorded or transcribed in 2006 was not inconsistent with Ms Jones' notes of her calls with the applicant. Those notes were not a transcription of the call. Nor were they a recording of the call in the sense used in this correspondence.

107 The ninth document, the 2020 email chain between the CBA and ASIC about the ASIC notice requiring production of records in relation to an account said to be the applicant's bank account, also does not assist the applicant. As we have said, it was possible for a refund to be issued to the applicant by cheque without his bank account number. Further, in circumstances where the CBA's search for records occurred in 2020, some 14 years after the refund of the applicant's AFSL application fee was said to have occurred, it was possible that by then, the account had been closed, and any records lost or destroyed. In any event, in our view it was well open to the jury to find on the balance of the evidence that a refund cheque had been issued to the applicant and drawn on by the applicant, regardless of the unavailability of any records from the CBA in response to the ASIC notice.

108 The tenth document is the internal ASIC email correspondence from January 2006 that was said to have been recorded against the applicant's file in case he tried again to apply for an AFSL. The applicant's submissions distort what was said in this correspondence. The ASIC analyst's 'serious concerns', and the recording of those concerns 'in case' the applicant tried again to apply, did not mean that any future application by the applicant would be rejected without consideration. And again, the document does not affect the prosecution's case that even if the applicant did submit an AFSL application in October 2006, it was inconceivable that he would interpret the absence of a response to that application as meaning he was licensed.

109 The final document, the amended statement of admissions, does not assist the applicant. The judge explained why the amended statement was inadmissible: it was sought to be adduced to prove the truth of the contested assertions made by the applicant in his additions to the document. The judge was correct not to permit the amended statement to be adduced in evidence, and it does not bear on whether it was open to the jury to convict the applicant.

110 Turning to the applicant's complaint that no 's 33 Notice' was adduced in respect of ASIC's investigation of him in 2006, the existence of such a notice was not relevant to the facts in issue. The charges related to conduct in 2011 to 2017. The time period of 2006 was relevant only because of the applicant's case that he had submitted an AFSL application in October 2006, after which he believed he was licensed. The applicant was warned about the prejudice which might be occasioned to him if he adduced evidence of ASIC's investigation in 2006, but he chose to do so, in order to advance a contention that ASIC closed its investigation in 2006 because it had received his further AFSL application in October 2006. That contention (which was ultimately not supported by the evidence of Mr Childs) would not have been assisted by the tender of the s 33 Notice said to have been served by Mr Childs in the course of the investigation.

111 As for the applicant's contentions that he believed his customers had breached their duty of disclosure, and that the CDPP failed to adduce evidence that he had paid out other customers, evidence of the purported breaches of duties of disclosure, and of payments made to other

customers, was before the jury. The applicant was permitted to emphasise these contentions in his closing address. And the judge summarised the contentions to the jury in her charge. Even if the jury had accepted these contentions, they did not necessitate a different verdict, as they were outweighed by the large body of evidence that the 'insurance' provided by the applicant was a sham.

112 Finally, the same may be said of the applicant's contention that there was no evidence that he had acted without a belief that he had a legal right to obtain premiums. The evidence that the 'insurance' provided by the applicant was a sham, and that he knew it to be a sham, was overwhelming.

113 The applicant's contentions on issue (e) therefore fail.

Issue (f): Was the judge biased and did the measures taken by the judge in response to the applicant's conduct constitute an error or irregularity in the trial?

Bias: submissions

114 The applicant submits that there was a 'premeditated objective by the trial judge to obstruct proper trial procedure, intentional manipulation of legal process and collaboration with prosecutor'. In addition, this is said to be an 'undeniable and crystal-clear case of Apprehended bias — prior and during trial, the trial-judge was not impartial in her decision making and judgements'.

115 The respondent says that there is no evidentiary basis to suggest the judge acted with actual bias, nor to suggest there was a danger of a fair-minded lay observer reasonably apprehending that the judge might not bring an impartial mind to the questions to be decided'. The judge was cognisant of the need to assist the applicant as a self-represented person in a criminal trial, and took numerous steps to assist him. These included arranging for various materials to be printed and provided to him, explaining objections and submissions made by the prosecutor, allowing the applicant additional time to consider and respond to issues, and explaining procedures to him.

Bias: consideration

116 In *CNY17 v Minister for Immigration and Border Protection*, Kiefel CJ and Gageler J said:

> The question whether conduct has resulted in a breach of the bias rule falls to be determined in light of the totality of the circumstances that exist at the time when that question arises.[12]

117 This Court has previously considered, and rejected, an allegation of bias made by the applicant against the trial judge in an application for leave to appeal an interlocutory ruling in the trial. Having reviewed the pre-trial transcript, the Court described the applicant's assertions of 'bias, prejudice and discrimination' as 'without foundation'.[13]

118 Upon examining the whole of the transcript, we find no evidence of bias on the part of the judge. Indeed, the judge made many allowances for the applicant, including by giving him breaks to search his materials or gather his thoughts, and printing documents for him even

12 (2019) 268 CLR 76, 88 [20]; [2019] HCA 50 (citations omitted).

13 *Tessa v DPP (Cth)* [2022] VSCA 61, [21], [28]–[29] (Priest and Beach JJA) ('*Tessa*').

though he repeatedly lost them. She gave him the information to make various applications, including those relating to the subpoenas. Often, she refrained from making adverse rulings against him, such as by allowing him to give uninterrupted evidence-in-chief of '[no] particular moment' so that he could 'get the flow to his evidence'. She allowed the applicant in his closing address to address inadmissible matters, such as ASIC 'not approving licenses' because 'they were eliminating the competition to create a monopoly'. She rejected sound objections by the prosecutor out of fairness to the applicant. And in her charge, she directed the jury not to draw adverse inferences from the applicant's behaviour or from her responses to his behaviour (which we consider in detail below).

119 In the absence of actual bias, the governing principle is that a judge is to be disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.[14] And, as, Kirby J said in *Johnson v Johnson*:

> [A fair-minded observer] would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. [The observer] must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. [The observer] will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably, [the observer] would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious.[15]

120 For the same reasons we reject the applicant's allegation of bias, we reject any allegation of apprehended bias. We do not consider that a fair-minded observer, who is taken to have some knowledge of the need for the judge to adopt reasonable efforts to control the proceedings, would reasonably apprehend that the judge was unable to bring an impartial mind to the resolution of the various issues that required adjudication during the course of the trial.

Measures taken by the judge in response to the applicant's conduct during the trial

121 We turn to the measures taken by the judge in response to the conduct of the applicant during the trial.

122 In the earlier application for leave to appeal in respect of an interlocutory pre-trial ruling, this Court observed that the applicant had at that stage refused to follow procedural directions by the judge, talked over her, and refused to stop talking when directed to do so.[16] This Court observed that the conduct of the proceeding 'would be vastly facilitated by the applicant taking the trouble to listen to the judge when she is speaking; not to talk over her; and to

14 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344–5 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ); [2000] HCA 63 (citations omitted).

15 (2000) 201 CLR 488, 508–9 [53]; [2000] HCA 48 (citations omitted), quoted in *Tessa* [2022] VSCA 61, [27] (Priest and Beach JJA).

16 *Tessa* [2022] VSCA 61, [21] (Priest and Beach JJA).

respond to relevant issues at the appropriate times for him to respond'.[17] The fact that the applicant was unrepresented did not mean he had 'a free pass to misbehave or treat the judge with disrespect or contempt'.[18]

123 At the outset of the trial, the judge announced a series of 'ground rules' for the conduct of the hearing. She explained that she would control the processes in the court and could make directions for the orderly management of the hearing. Issues would be dealt with in the order that she set and the applicant would be given an opportunity to address her at an appropriate time. The applicant was not to interrupt her or the parties, and was to confine his submissions to matters that he was asked to address. Any document he sought to place before the jury would need to satisfy the test of admissibility of evidence. The applicant was to respect her rulings, which would be binding, even where he disagreed with them. If the applicant flouted her directions, spoke over her, raised his voice or refused to stop when directed to do so, she would take him as having forfeited his right to make further submissions on the point or otherwise to continue addressing or cross-examining a witness.

124 The judge told the applicant that if he disrupted the hearing to the extent that it could not proceed in his presence, she could direct his removal from the courtroom and would consider directing him to participate in the trial from a remote witness room that had been set up for that purpose. She could also continue the hearing in the applicant's absence if he was disruptive and she considered that he could not return without disruption. She would warn the applicant if she was considering taking those courses.

125 If the hearing was continued in the applicant's absence, the judge said she would ensure that he received a transcript of the hearing as soon as possible, as well as an opportunity to make submissions on matters dealt with in his absence, if she considered it appropriate.

126 The trial judge repeated these 'ground rules', in summary form, at the outset of many days of the trial.

127 Unfortunately, from our review of the trial transcript, it is apparent that there were many occasions throughout the trial when the applicant's behaviour did not comply with these ground rules. There can be little doubt that the applicant's behaviour made his trial difficult.

128 The judge took various measures in response to the applicant's conduct, which increased in severity as the trial went on.

129 In summary, those measures may be categorised as follows.

130 First, there were a number of occasions when the judge stood the proceedings down and left the bench. On most of these occasions, the applicant had repeatedly interrupted or been argumentative with the judge. On one occasion, the judge had sent the jury out to deal with an objection raised by the prosecutor. The applicant complained about the objection being determined in the absence of the jury. The judge stood the matter down to allow the applicant to 'get your manners back'.

131 Secondly, there were a number of occasions where the judge ordered that the applicant be removed from the courtroom and the proceeding was halted until his return.

132 Thirdly, the judge terminated the applicant's cross-examination of four witnesses, being

17 *Tessa* [2022] VSCA 61, [21] (Priest and Beach JJA).
18 *Tessa* [2022] VSCA 61, [28] (Priest and Beach JJA).

Mr Hanna (a complainant), Mr Dasgupta, the Westpac witness, and two ASIC witnesses, Ms Dormer and Mr Childs. The termination of Ms Dormer's cross-examination was somewhat less absolute than that which occurred on the other three occasions. As we explain below, the judge halted Ms Dormer's cross-examination as a result of the applicant's behaviour, but subsequently granted his request to ask two further questions, both of which were then disallowed for irrelevance.

133 Fourthly, there were three occasions where the judge ordered that the applicant be removed from the courtroom and taken to the remote witness room to participate in the trial by two-way audiovisual link. The first time this occurred was during the applicant's cross-examination of Mr Dasgupta. The second time was during the applicant's own cross-examination. After his removal to the remote witness room on this second occasion, the judge at times 'muted' the applicant when he was attempting to speak. The third time the judge ordered the applicant to be removed to the remote witness room was during the applicant's closing address. The judge had cut short the applicant's closing address and adjourned the proceedings for the day. Overnight, the judge decided to allow the applicant to continue his closing address, but on various conditions, including that he give the remainder of his address, which was to be limited to 15 minutes, from the remote witness room.

134 Fifthly, there was one occasion where the judge ordered that the applicant be removed from the courtroom and then continued the proceedings in his absence, without making provision for him to participate from the remote witness room. This occurred following the judge's termination of the applicant's cross-examination of Mr Childs. The judge permitted the prosecutor to re-examine Mr Childs in the applicant's absence and said she would provide the applicant with a transcript. In the applicant's absence, the prosecutor asked two questions of Mr Childs in re-examination. The applicant was then brought back into the courtroom.

135 Sixthly, although the judge indicated that she would permit the applicant to give evidence in re-examination at the conclusion of his cross-examination, she quickly terminated his re-examination.

136 Finally, the judge imposed constraints on the applicant's opening and closing addresses, in that she terminated the applicant's opening address before it was complete and imposed conditions on the completion of his closing address.

137 Throughout the trial, the judge repeatedly directed the jury not to treat the applicant's behaviour, or any of the measures taken in response to that behaviour as bearing upon their consideration of the charges. In her charge to the jury, she said the following:

> Mr Tessa's behaviour in the course of the trial was at times challenging. There were many times I directed him to stop doing what he was doing, because it was not permitted; whether that was interrupting, speaking over me, [the prosecutor] or a witness, attempting to introduce topics that I had ruled were irrelevant or inadmissible, raising his voice or otherwise ignoring rulings or directions or disrupting the proceedings. At many times he did not comply with the rulings or directions that I gave.
>
> Many times I directed that he be removed from the courtroom to allow things to settle, or at times, to allow the trial to proceed but without interruption. Now, I have all ready [sic] directed you about the need to distinguish between disruptive behaviour in court and the legitimate advancing of matters that are relevant to the issues in the trial and to Mr Tessa's defence,

> in accordance with the rules that govern all criminal trials. My interventions were designed to ensure that the trial proceeded fairly and according to law and that the trial was not unfairly or wrongly disrupted by Mr Tessa's conduct.
>
> But my interventions and the force with which I expressed myself at times, should not be read as any indication of my view about whether Mr Tessa is guilty or not guilty. No indication about what the outcome of the trial should be and no indication as to what your proper verdicts should be. The verdicts are and remain your responsibility. You must decide whether, in that calm and dispassionate assessment of the evidence, the prosecution has satisfied you of Mr Tessa's guilt of any charge if you're to find him guilty.
>
> So this is really an application of the rule that you must set aside sympathy or prejudice or emotion, if you felt any sympathy for or prejudice against Mr Tessa by reason of his behaviour or of my responses.

Submissions

138 Following the hearing in this matter, we invited the parties to file further submissions addressing whether the steps taken by the judge in response to the applicant's behaviour, either viewed in isolation or collectively, constituted an error or irregularity in the trial such that a substantial miscarriage of justice had occurred. The parties were also invited to address the relevance or otherwise of s 246 of the *CPA*, which provides that an accused person 'must attend all hearings conducted under [Chapter 5] in the criminal proceeding against the accused unless excused under section 330'. The respondent filed further submissions addressing these matters on 19 June 2024 and the applicant filed further submissions on 2 July 2024.

Applicant's submissions

139 The applicant refers to his 'legal ability and legal right of self-representation to address, present, respond, cross-examine and constructively debate when necessary (which was the case) … important, valid points during proceedings of the trial, in order to provide full comprehensive account of events, documents, information, so that the jury is properly and adequately informed in order to accurately evaluated [sic], consider and determine correct, just verdict'.

140 The applicant says that the measures taken by the judge in response to his behaviour were 'intentional preconceived machinations, to subdue and shutdown the self-represented, in order to prevent an [sic] obstruct the important condemning evidence of facts to be heard, observed and to be deliberate [sic] on, with preconceived intent, to prevent the factual truth of matters to be reviled [sic]'.

141 The applicant also says that s 246 of the *CPA* is of 'direct relevance', and that none of the subsections in s 330 apply.

Respondent's submissions

142 The respondent submits that the steps taken by the trial judge were necessary and did not amount to a substantial miscarriage of justice. The applicant's conduct was at times, 'outrageous'. He yelled and shouted at the judge and prosecutor; called the prosecutor names;

yelled at, belittled or made aspersions about witnesses; talked over the judge to make his points despite being clearly directed not to; deliberately defied previous rulings and repeatedly contravened the acceptable standards of behaviour set by the judge.

143 The respondent says that the right of an accused person to be tried in person and to personally defend a charge are not absolute. The judge's clear ground rules were made in an attempt to obtain the applicant's cooperation and compliance with court processes, whilst also ensuring he was able to make submissions on topics that were relevantly in issue. When the applicant misbehaved and disrupted the trial, he was warned of potential consequences, including that he would not be permitted to continue questioning witnesses, addressing the judge or jury and may be removed from the courtroom. At no stage was a measure taken that had not been forewarned. There was only one occasion when evidence continued in the applicant's absence. Before this occurred, the applicant had been granted significant leeway in his cross-examination of the witness. Only two questions were asked of the witness in his absence and the applicant was provided with a transcript. He later gave evidence about his interactions with the witness and addressed the jury on the issue to which the evidence was directed in his closing. The jury could not have misapprehended his position on the evidence.

144 The respondent emphasises that the jury were repeatedly directed to put the applicant's behaviour to one side and focus on the evidence. None of the steps taken by the judge would have left the jury in any doubt about the nature of the applicant's case. The prosecution case was overwhelming and the applicant's conviction was inevitable.

145 As to s 246 of the *CPA*, the respondent says that provision did not prevent the exercise by the judge of a common law power to remove the applicant and continue the evidence in his absence. The primary purpose of the provision was to place an obligation on an accused person to attend all court hearings under Chapter 5. It operates subject to s 330, which empowers a court to excuse an accused person from attendance.[19] However, the requirement that an accused person attend all hearings subject to being excused 'does not mean that when in attendance the accused can contemptuously misbehave and insist on a right to remain in attendance whilst continuing that behaviour'. When it enacted s 246, Parliament recognised the existence of common law powers to remove an accused and/or continue in their absence, and did not seek to alter these powers.[20]

Relevant authorities

146 Various authorities have considered the right of an accused person to be present during their trial, and the lawfulness of measures taken to restrict their participation as a result of misbehaviour.

147 In *R v Abrahams*,[21] multiple accused were ill during the trial and were given permission to be absent from the courtroom. In the presence of their counsel, the judge gave certain directions to the jury. A case was stated for the Full Court of the Supreme Court of Victoria, being whether in those circumstances the convictions were good. The Full Court held that they were.

148 Of note for present purposes, in reviewing the relevant principles, Williams J said that an accused's right to be present at trial was subject to the qualification that they did not abuse it

19 Section 330(3).
20 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, 4977.
21 (1895) 21 VLR 343 ('*Abrahams*').

by unseemly, indecent or outrageous behaviour. If they did so abuse it, then the judge could have the accused removed and proceed with the trial in their absence:

> The primary and governing principle is, I think, that in all criminal trials the prisoner has a right, as long as he conducts himself decently, to be present, and ought to be present, whether he is represented by counsel or not. He may waive this right if he so pleases, and may do this even in a case where he is not represented by counsel. But then a further and most important principle comes in, and that is, that the presiding Judge has a discretion in either case to proceed or not to proceed with the trial in the accused's absence. In the case where the prisoner is not represented by counsel, and waives his right to be present, the Judge would, in all probability, having regard to the principle just stated, that a prisoner ought to be present, exercise his discretion by not proceeding with the trial in the absence of the accused[.] … [I]n my opinion in all cases … he has a right to be present, subject only to one qualification, and that is, that he does not abuse that right. If he abuses that right for the purpose of obstructing the proceedings of the Court, by unseemly, indecent, or outrageous behaviour, the Judge may have him removed and proceed with the trial in his absence or he may discharge the jury, but subject to that qualification the right of being present remains with the accused as long as he claims it. When he waives it, then the discretion of the Judge comes into play. … [T]he Judge's discretion is very much at the root of the whole matter, subject to the accused's right, when he has not forfeited the right, does nothing to forfeit it, or does not waive it, to be present.[22]

149 In *Lawrence v The King*,[23] a judge became aware that a sentence he had passed was defective. In chambers (and thus in the absence of the accused), he drew up and recorded a revised sentence. In setting aside the sentence, the Privy Council said:

> It is an essential principle of our criminal law that the trial for an indictable offence has to be conducted in the presence of the accused; and for this purpose trial means the whole of the proceedings, including sentence. There is authority for saying that in cases of misdemeanour there may be special circumstances which permit a trial in the absence of the accused, but on trials for felony the rule is inviolable, unless possibly the violent conduct of the accused himself intended to make trial impossible renders it lawful to continue in his absence. The result is that sentence passed for felony in the absence of the accused is totally invalid.[24]

150 In *R v Vernell*,[25] during a pre-trial hearing, the unrepresented accused made noise and disturbances such that it was not practicable to proceed, and he was removed from the court. Upon being permitted to return, he vaulted over the dock and rushed towards the door. When the jury were being empanelled, he shouted, screamed, verbally abused the judge, and struggled with the warders. After being warned, he was again removed. Later, upon being permitted to return, he challenged nine jurors in succession. On the ninth challenge, he was asked to show cause, to which he concocted a false account. Following the empanelment of the jury, he repeatedly kicked the dock. He shouted that he dismissed his counsel, and said to

22 (1895) 21 VLR 343, 346–8.
23 [1933] AC 699 ('*Lawrence*').
24 [1933] AC 699, 708 (Lord Atkin for the Court).
25 [1953] VLR 590 ('*Vernell*').

the judge, ‘Now see what you are going to do’. After being warned, he was removed and the trial continued in his absence.

151 On two further occasions the accused was brought back into the courtroom. On the first, he was told that if he behaved himself he could stay and cross-examine witnesses. He was again disorderly and was removed. On the second, he was told that he could address the jury but he declined.

152 On appeal to the Full Court of the Supreme Court of Victoria, the accused contended that his trial was invalid because he had not been present during the whole of the proceedings. The Court (Martin, O’Bryan and Smith JJ) rejected that contention.

153 Martin and O’Bryan JJ referred to *Abrahams* and *Lawrence*, and said:

> [T]he only possible reason for continuing a trial in the absence of an accused person is when his violent conduct is intentional and done to prevent the trial being held.
>
> In the case before us the learned trial Judge has advised that he had no doubt the applicant behaved as he did with the intention of preventing the trial continuing.
>
> …
>
> [I]f the conduct of the accused is so disorderly that the trial cannot proceed whilst he is present, the presiding Judge may order his removal from the Court and proceed with the trial in his absence …
>
> It is obvious that if a Judge had no such power any accused person, by repeating his obstreperous conduct time after time, would succeed in postponing his trial indefinitely or until he came before a Judge or a jury whom he thought might be better for him than earlier ones.[26]

154 Their Honours said that the right to hear what is alleged, to test evidence by cross-examination, to put one’s case, and to address the jury, were rights which could be voluntarily abandoned by an accused’s conduct:

> An accused person must be given every opportunity to hear all that is alleged against him, to test any evidence by cross-examination, either by counsel or himself, to put his case and address the jury; but if he shows, by his conduct, that not only does he not desire to avail himself of such opportunity but he is determined that the jury shall not hear the evidence against him and that the orderly procedure of a trial is not to be permitted to function, then he voluntarily abandons his rights, and it is essential that the presiding Judge have power to see that justice is not frustrated and brought to nothing by his contumacious behaviour.[27]

155 In the result, their Honours held that the accused had been so noisy, disorderly and obstreperous that on each occasion that he was removed, it would have been ‘extremely

26 [1953] VLR 590, 595–6.
27 [1953] VLR 590, 596.

difficult, if not impossible' for the trial to proceed had he not been removed.[28]

156 Smith J also referred to *Abrahams* and *Lawrence*. He said an exception to the principle that an accused must be present at their trial arose on the fulfilment of two conditions:

> As I understand what was said in *Lawrence's Case*, the exception there suggested is one arising upon the fulfilment of two conditions, namely, (i) that the accused's conduct is intended to make trial impossible, and (ii) that it does in fact have that effect. The second of these conditions was not expressly stated, but I take it to be implicit in what was said.[29]

157 Smith J held that the terms of the judge's report showed that the judge was satisfied of the two conditions, and there was ample material on which to be so satisfied.[30]

158 In *Eastman v The Queen*,[31] throughout a trial conducted in the ACT Supreme Court, the unrepresented accused verbally abused the judge, the prosecutor, and witnesses. The accused called the judge a 'corrupt shit' and 'lying cunt'. He chanted 'Stop judicial condonation of harassment' while witnesses were giving evidence. One witness implored the judge to stop the accused from bullying them while they gave evidence. After warning the accused that he would be removed to a separate room with a two-way audiovisual link if he persisted, the judge so removed him, and purported to revoke his bail. (Later, the judge refused to grant the accused bail.) At times, the judge turned down the volume of the audiovisual link, so as to prevent the accused from being heard in the courtroom. The judge directed the jury not to draw any adverse inferences against the accused as a result of these measures. On appeal, the accused contended that the judge had erred in removing him to the separate room, in revoking his bail, and in subsequently refusing him bail.

159 The Full Court of the Federal Court referred to *Vernell*, and said:

> The right of an accused to be present on his or her trial to hear the evidence and to confront his or her accuser while a paramount consideration is not without qualification and the means by which it is exercised is subject to the control of the trial judge.[32]

160 The Court also referred to a decision of the New South Wales Court of Criminal Appeal in *R v McHardie* (a case where the accused absconded during trial), in which the Court said:

> It should also be observed that when the trial starts, the procedure of a normal criminal jury trial provides for the presentation of the Crown case in the presence and hearing of the accused, and includes the right of the accused to test the evidence by cross-examination, either by himself, or by his legal representative. It also includes the right to give evidence (or to make a statement), the right to call evidence, and the right, either by himself or his counsel, to address the jury. We think it correct to describe these procedural steps as 'rights', which may or may not be exercised by the accused at his option. The non-exercise of any of the accused's rights does not vitiate the trial.

28 [1953] VLR 590, 597.
29 [1953] VLR 590, 598 (citations omitted).
30 [1953] VLR 590, 600.
31 (1997) 76 FCR 9 ('*Eastman*').
32 (1997) 76 FCR 9, 43–4 (von Doussa, O'Loughlin and Cooper JJ).

> … [T]he accused person has a right to be present at his trial, subject to his conduct. It seems clearly established by authorities (as it is by commonsense) that if the accused person behaves intentionally to make the continuation of the trial impossible, and if such conduct is found by the trial judge to have that effect, he may be removed from the court.[33]

161 The Court said the correctness of the judge's decision to remove the accused to the separate room was to be tested by the statements of principle in *Vernell* and *McHardie*. The accused had wilfully engaged in a course of conduct disruptive of the trial, and had been warned repeatedly, including that he would be removed to the separate room. The judge had given him given considerable latitude. The audiovisual facility preserved his ability to participate in the trial, and he was permitted to stay in the courtroom when he was not disruptive. The judge also adequately directed the jury. The Court said that the measures taken 'impeded only so far as was necessary the appellant's opportunity to hear that which was alleged against him and to conduct his defence'. For these reasons, the judge 'in the exercise of his discretion' was entitled to take the course he did.[34]

162 As to the complaints about bail, the Court said that nothing turned on them because the purported revocation did not occur before the jury, and the judge's later refusal to grant bail was not used coercively to control the accused. Rather, the need to detain him in a separate room was a circumstance likely to adversely affect his resolve to attend trial in future, and that was a relevant consideration under the bail legislation.[35]

163 In *R v DAJ*,[36] the judge asked questions of the accused, who was represented by counsel, which caused him to become agitated. The judge adjourned the court. The accused did not return promptly to the courtroom when requested to do so and instead delayed for some minutes. This, and an earlier occasion of similar conduct, caused the judge to revoke the accused's bail. When the court adjourned later that evening, while the accused was being taken into custody, he lost his temper and used foul language. The arresting officer also somehow fell on the floor. The next morning the judge directed, over objection, that the accused be taken to the cells. For five minutes, the judge directed the jury on the irrelevance of the events of the previous evening, and asked if they were able to return an impartial verdict. The jury indicated that they were. The accused was brought back.

164 On appeal, the accused contended that the judge erred in addressing the jury in his absence. The Court of Appeal of Queensland allowed the appeal on an unrelated basis.[37]

165 McMurdo P said that she would also allow the appeal based on the events of the morning. She referred to s 617 of the *Criminal Code Act 1899* (Qld), which she said reflected the common law as set out in cases including *Lawrence* and *Vernell*. That section relevantly provided:

> **617 Presence of accused**
>
> (1) Subject to this section the trial must take place in the presence of the accused person.

33 [1983] 2 NSWLR 733, 739 (Begg, Lee and Cantor JJ) ('*McHardie*').
34 (1997) 76 FCR 9, 44–5.
35 (1997) 76 FCR 9, 45.
36 [2005] QCA 40 ('*DAJ*').
37 [2005] QCA 40, [9], [40]–[42] (Jerrard JA, McMurdo P agreeing at [1], Mackenzie J agreeing at [48]).

> (2) If an accused person so conducts himself or herself as to render the continuance of the proceedings in the person's presence impracticable, the court may order the person to be removed and may direct the trial to proceed in the person's absence.

166 McMurdo P said although the accused created a minor disturbance on the evening before, when he was excluded from the trial in the morning he had not been behaving in a way as to render trial in his presence impracticable. The resulting error of law was so fundamental to the criminal trial process that it invalidated the whole trial and required that the appeal be allowed.[38]

167 Jerrard JA said that rather than complaining about the way the judge conducted the trial, the accused contended that the events of the evening and morning made the trial unfair. Jerrard JA considered that contention untenable, because the accused could not be seen to advantage himself by his own ill-tempered conduct before the jury. He said no error was shown by the judge in insisting on maintaining control of the proceedings.[39]

168 Mackenzie J preferred not to decide the question of whether the exclusion of the accused was such a fundamental flaw as to entitle the accused to a new trial, given that the appeal was to be allowed on another basis. However, he said that it was difficult to conclude that continuation of the trial in the accused's presence was impracticable, particularly given that after the accused was re-admitted to the court the trial proceeded in his presence without incident.[40]

169 We note that in its further written submissions, the respondent addressed the comments of McMurdo P in *DAJ*. The respondent said *DAJ* was distinguishable, because at the time *DAJ* was removed, there was no misconduct, and the removal related to a 'minor disturbance' the previous day. These circumstances were said to be far removed from the present case.

170 In *Sonnet v The Queen*,[41] the accused told the judge he was unable to behave and that if he was not excused, he was bound to disrupt the trial. The judge granted him permission not to be in court for significant parts of his trial. The accused absented himself during the empanelment of the jury and delegated to his counsel his rights of challenge. Later, during the judge's charge, the accused dispensed with legal representation and asked to be excused. The judge refused. The accused then misbehaved by interrupting communications between the judge and the jury, resulting in the judge allowing him to leave.

171 On appeal, the accused contended that the arrangement to delegate his right to challenge jurors to counsel was a nullity under the *Juries Act 2000*; and that the judge should have acceded to his request to leave during her charge, and because she did not, he had behaved in a way which harmed his defence.

172 This Court rejected both contentions.

173 First, the *Juries Act* did not require an accused personally to exercise the right of challenge. The Court said although the arrangement in that case should be avoided in most cases, it was an exceptional case, in which there was good reason for the applicant to be removed at his

38 [2005] QCA 40, [6].
39 [2005] QCA 40, [44].
40 [2005] QCA 40, [51]–[52].
41 (2010) 30 VR 519 ('*Sonnet*').

request. The Court referred to *Abrahams*, *Vernell* and *Eastman*.[42]

174 Secondly, the Court said the accused had no right to be excused, still less to dictate that if he did not get his way, he would misbehave. He understood the potential consequences of his behaviour, so it was not unfair that he should live with any such consequences. In any event, there were no consequences here because the jury had been directed that the accused's behaviour was not relevant.[43]

175 In *O'Connell v Western Australia*,[44] the accused was verbally abusive to the judge and witnesses. He asked the judge for his neck size so that he could be hanged for treason. Other times he called the judge 'Captain Pugwash', 'De Fuhrer' and 'Comrade Stalin'. When cross-examining witnesses, he gave speeches and engaged in irrelevant anti-Semitic discourse. On occasion, the judge prevented witnesses from giving answers to questions. On other occasions, the accused made irrelevant comments about Jewish people, which comments the judge said were 'pathetic'. The accused disrupted the prosecutor's closing address and the judge's summing up to the point where he had to be removed to a remote courtroom from where he could see and hear the proceedings. On appeal, the accused contended that the judge failed to accord him procedural fairness. The Court of Appeal of Western Australia rejected that contention.

176 Mazza JA (with whom Martin CJ and Buss JA agreed) said it was necessary that a trial judge control the proceedings:

> For example, a trial judge may intervene in order to prevent irrelevant matters being raised and pursued, and any unnecessary delays or disruptions. A trial judge should protect witnesses from being required to answer irrelevant, embarrassing and scandalous questions and to prevent questions becoming speeches or statements to the jury.
>
> …
>
> An unrepresented accused cannot … conduct him or herself in a way that would not be acceptable from defence counsel. Being unrepresented is not a free pass to misbehave, flout the legal or procedural rules, ignore the law of evidence or to treat the trial judge and witnesses with disrespect or contempt. Where an unrepresented accused acts or attempts to act in any of these ways, a trial judge must fairly and, if necessary, firmly deal with such behaviour. The extent to which a trial is regarded as fair will be examined in the light of the accused's own conduct.[45]

177 Mazza JA said the judge was justified in intervening where the accused had made an inappropriate comment, and where irrelevant evidence would have been introduced. Although the judge's characterisation of the accused's comments as 'pathetic' were strongly worded, this did not indicate unfairness.[46]

178 Mazza JA also noted that the accused had been allowed to give lengthy and 'hardly

42 (2010) 30 VR 519, 549 [105]–[106] (Nettle, Harper JJA and T Forrest AJA); [2010] VSCA 315.
43 (2010) 30 VR 519, 550 [114]–[115]; [2010] VSCA 315.
44 [2012] WASCA 96 ('*O'Connell*').
45 [2012] WASCA 96, [104], [109] (Martin CJ agreeing at [1], Buss JA agreeing at [2]) (citations omitted).
46 [2012] WASCA 96, [116]–[118].

interrupted' evidence-in-chief, including on the views of various authors about Jewish people, despite previously being told that he would not be permitted to give hearsay evidence. Mazza JA said the accused had said all that he could say in his defence, and was given very considerable latitude to do so.[47]

179 This review of the authorities establishes the following common law principles:

(1) An accused person has a fundamental right to be present at their own trial (*Abrahams*; *Lawrence*; *Vernell*; *McHardie*; *Eastman*; *DAJ*) as well as rights to test evidence by cross-examination, to give and call evidence, and to address the jury (*Vernell*; *McHardie*; *Eastman*).

(2) These rights are not without qualification and the means by which they are exercised are subject to the control of the trial judge (*Eastman*; *O'Connell*).

(3) An accused person can choose to waive these rights (*Abrahams*; *Sonnet*) and will also be *taken to have* waived these rights where their conduct makes the continuation of the trial impossible, and is intended to have that effect (*Abrahams*; *Lawrence*; *Vernell*; *McHardie*).

(4) Where the accused person is taken to have waived their rights, it may be appropriate to remove them from the courtroom and continue the trial in their absence (*Abrahams*; *Lawrence*; *Vernell*; *McHardie*; *Eastman*) or remove the accused person to a separate room to participate through audiovisual facilities that enable the accused to be 'muted' at times (*Eastman*; *O'Connell*).

(5) Ultimately, the extent to which a trial is regarded as fair will be examined in light of the accused person's own conduct (*O'Connell*).

Consideration of first and second measures: pausing the proceeding

180 Having set out these principles, we turn to consider the various measures taken by the judge in response to the applicant's behaviour.

181 The first measure, standing down the proceeding when the applicant misbehaved, was permissible. It gave the applicant an opportunity to recompose himself, and allowed the judge to restore order in the courtroom. There is no prohibition at common law or in the *CPA* on this type of response to the conduct of an accused person.

182 The same can be said of the second measure, which involved removing the applicant from the courtroom and pausing the proceeding until his return.

183 We note that on two of these occasions, the transcript records that the applicant (who was on bail) was removed 'to the cells'. The first occasion was prior to the commencement of the applicant's opening address, after the applicant argued with the judge about a ruling. He appears to have been brought back to court ten minutes later. The second occasion followed the applicant's disruption to the examination in chief of Nicholas Vonarx, an ASIC witness. The applicant appears to have been brought back to court less than ten minutes later. On both occasions the direction to remove the applicant 'to the cells' was given in the absence of the jury.

47 [2012] WASCA 96, [129]–[131], [135].

184 While we have no concerns with the judge removing the applicant from the courtroom and pausing the proceeding until his return on either of these occasions, we are not convinced that the circumstances warranted the judge directing that the applicant be taken to the cells. However, we do not regard the fact that those directions were given to have caused any irregularity in the applicant's trial, particularly as they were given in the absence of the jury.

Consideration of third measure: termination of applicant's cross-examination of certain witnesses

185 The third measure taken by the judge in response to the applicant's behaviour was cutting short the applicant's cross-examination of four witnesses. As we have explained, the judge specifically warned the applicant, as part of the 'ground rules', that should he flout her directions, speak over her, raise his voice or refuse to stop when directed to do so, she would take him as having forfeited his right to continue cross-examining a witness.

186 The first time the judge terminated the applicant's cross-examination of a witness was on the fourth day of the trial, during the evidence of Mr Hanna. As we have said, Mr Hanna was one of the complainants. He said he made an insurance claim with the applicant after certain machines used in his business had been stolen and he had bought new machines on finance to replace them. The claim had been denied on the basis that he had failed to provide certain financial documents relating to his business.

187 The judge gave the applicant numerous warnings throughout his expansive cross-examination of Mr Hanna, which spanned around 45 pages of transcript. Despite those warnings, the applicant asked Mr Hanna repetitive questions, interrupted Mr Hanna's answers, misrepresented Mr Hanna's answers, belittled Mr Hanna, gave evidence, and spoke over the judge, The judge warned the applicant on three occasions that he was at risk of forgoing his right to cross-examine Mr Hanna. The cross-examination culminated in the following exchange:

> So did you buy them [the machines] or did you replace---?---I bought it. Yes, I bought it.
>
> When?---Yes, I bought it. I can't remember.
>
> You can't remember?---No.
>
> How many did you buy?---I can't remember.
>
> How many did you replace?---I can't remember.
>
> You can't remember?---Yeah.
>
> So now you can't remember. Have you got issues with the memory?---(No audible response.)
>
> Mr Hanna, have you got issues with your memory?---I don't have issues.
>
> No?---You're asking me questions, like, you're just back and forward, back and forward. There is no need for these things. Okay, you ask me a question — this is — this is what I provided. If I replaced a machine, like I bought a machine recently, I've been paying [off] that machine, I have

evidence of what I purchased. I have all this evidence what I purchased recently, and I've been paying it [off] over — over the time on — on — on, like, a — on, like, easy payment.[48] So what's---

HER HONOUR: Now, Mr Hanna?---Sorry.

Just settle again. I know you're finding this frustrating, but Mr Tessa has a right to ask questions?---Yeah, your Honour.

And I — it's Mr Shaw's obligation to object if he says it's irrelevant---?---Yeah, yeah.

---and it's my obligation to intervene if I think it's irrelevant?---Yeah.

Please go on, Mr Tessa.

ACCUSED: The reason I'm asking about your — I'm just concerned about your health because throughout the questioning---

HER HONOUR: No, Mr Tessa. Mr Tessa, I disallow that. Move on, please.

ACCUSED: Sure. No. On all the questions that have been asked and put by me towards you, you have really haven't given definitive answers and all you are doing is saying you can't remember or you can remember.

HER HONOUR: No, Mr Tessa. Mr Tessa, stop. I've said I'd disallow that and that's your last warning.

ACCUSED: All right.

HER HONOUR: I've told you, if you flouted my rulings again, that you would forfeit your right to continue cross-examination. You have done so. You have forfeited your right to ask any more questions in cross-examination.

188 We see no error in the judge's decision to terminate the applicant's cross-examination of Mr Hanna in these circumstances. The applicant had persistently refused to abide by the judge's rulings. These rulings included rulings that the judge was required to make by s 41 of the *Evidence Act 2008*. Section 41 provides that a judge must disallow 'improper' questions in cross-examination, which include any question or sequence of questions that:

> (a) is misleading or confusing; or
>
> (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
>
> (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate … .[49]

189 The second time the judge terminated the applicant's cross-examination of a witness was on the sixth day of trial, during the evidence of Mr Dasgupta. As we have said, Mr Dasgupta was

[48] Presumably this was a reference to a finance service.

[49] Section 41(3).

an employee of Westpac who gave evidence about the withdrawal of cheque 660289 from ASIC's bank account. The applicant sought to ask Mr Dasgupta about entries on the bank statement other than the entry for cheque 660289. The judge upheld the prosecutor's objection to these questions on the ground of irrelevance. However, the applicant continued to pursue the disallowed line of questioning. The judge gave the applicant a 'last warning'. When the applicant continued to put the disallowed questions, the judge told the applicant he had forgone the right to ask further questions of the witness and terminated the cross-examination.[50]

190 We see no error in the judge's decision to terminate the cross-examination of Mr Dasgupta in these circumstances. Two fundamental premises of a trial are that only admissible evidence may be admitted, and that the trial judge's rulings must be complied with. Unless these premises are respected, a trial is liable to miscarry. The applicant's conduct evinced an unmistakable intention to disregard these premises. An accused person cannot be permitted to defeat the rules of evidence[51] by simply ignoring rulings on admissibility.

191 The final two occasions on which the judge terminated the applicant's cross-examination of a witness involved two ASIC witnesses, Ms Dormer and Mr Childs.

192 As we have explained above, Ms Dormer gave evidence that ASIC's records showed that a cheque numbered 660289 for $270 had been generated on 12 December 2006 in favour of Eastern Profits Pty Ltd as a refund of an AFSL application fee. Throughout Ms Dormer's cross-examination, it was necessary for the judge to admonish the applicant for rudeness on multiple occasions, and to halt the proceedings to give the applicant 'some time out'. After Ms Dormer's evidence recommenced, the judge was required to request the applicant to refrain from making speeches, to stop interrupting the witness (on multiple occasions) and to lower his voice and not yell at the witness (on multiple occasions). When the applicant continued to speak to the witness in a raised voice, the judge warned him that if he did so again, she would take it that he had foregone his right to continue to cross-examine her.

193 The applicant then commenced asking Ms Dormer, as he had sought to do with Mr Dasgupta, about entries on the Westpac back statement other than the entry for cheque 660289. The prosecutor again objected to these questions on the ground of irrelevance. The judge allowed the objection, referring to her earlier ruling. She indicated that if the applicant argued with her about that ruling, she would take it that he had forgone his right to continue cross-examining the witness. The judge invited the applicant to turn to a different topic. When the applicant declined to do so, the judge halted the proceeding and indicated that when the jury returned, Ms Dormer would no longer be answering the applicant's questions.[52] After a short adjournment, the judge relented and granted the applicant's request to ask two more questions of Ms Dormer. Both questions were disallowed on the ground of irrelevance.

194 We see no error to the judge's handling of the applicant's cross-examination of Ms Dormer. While the immediate precursor to the decision to halt the cross-examination was the applicant's failure to abide by the judge's ruling on relevance, it is clear that the applicant's behaviour during his cross-examination of Ms Dormer was problematic in multiple ways. We see no error in the judge's response to that behaviour.

50 The judge also directed that the applicant be removed from the courtroom and participate from a remote witness room, a matter that we address below: at [210]–[211], [217].

51 Cf *Vernell* [1953] VLR 590, 596 (Martin and O'Bryan JJ).

52 The judge also directed that the applicant be removed from the courtroom, a matter we addressed above: at [181]–[182].

195 As for Mr Childs, the termination of the applicant's cross-examination of this witness occurred after the applicant sought to question Mr Childs about the email dated 19 July 2006 to ASIC from Ms Kirchlinde of IBD. We have dealt with this document above, which we have described as the third document relied on by the applicant to demonstrate that the verdict was unreasonable and unsupported by the evidence. It will be recalled that the applicant relied on the document in that context in support of his assertion that he only had a mobile phone number, not a landline.

196 The applicant sought to tender the document through Mr Childs. The prosecution objected, on the basis that the applicant had not asked Ms Kirchlinde about the document, nor Ms Jones, who was the recipient of the document. The applicant resiled from the attempt to tender the document. He then asked Mr Childs to read aloud from it, which the judge did not permit.

197 The applicant then spoke over the judge and said: 'It says … Mr Tessa has only one — one telephone number'. The judge sent the jury out and gave the applicant a 'first and final warning', stating that if he spoke over her again, and tried to put before the jury something that she had not yet determined to be admissible, he would forgo his right to continue cross-examining Mr Childs.

198 After a brief adjournment, the applicant took Mr Childs to his record of a conversation Mr Childs had with the applicant in November 2006. Mr Childs said he had called the applicant on a particular landline number. The applicant showed Mr Childs other documents that described that number as a fax number. He said that Mr Childs was claiming to have been talking to a fax machine. He then said that the number was a fax number and that the only number he had was a mobile number. The judge directed the applicant not to give evidence. The applicant continued to refer to the email from Ms Kirchlinde that he had not been permitted to tender. The judge terminated the cross-examination and asked the prosecutor if he had any re-examination of the witness. The prosecutor said that he did. The applicant said to Mr Childs 'you're a fraud and dishonest at that', following which the judge directed his removal. The judge permitted Mr Childs' re-examination to occur in the applicant's absence and indicated that she would provide the applicant with a transcript.

199 We address the judge's decision to permit re-examination to proceed in his absence below. As to the termination of the cross-examination, we see no error in the judge's approach. The applicant had again failed to heed a specific warning from the judge about the potential consequences of his behaviour. He ignored the direction from the judge to not give evidence and to not seek to put before the jury something that was yet to be determined to be admissible.

Consideration of fourth measure: direction to appear from remote witness room

200 We turn to the fourth measure taken by the trial judge in response to the applicant's behaviour, namely the removal of the applicant from the courtroom to a remote witness room, from where he was to participate in the trial by way of audiovisual link.

201 As we have explained above, the authorities establish that at common law, removing an accused person to a separate room where they can observe and participate in the trial by way of an audiovisual link, including where they can be 'muted', can be a permissible means of

limiting the impact of a misbehaving accused on the trial.[53]

202 In Victoria, the *CPA* and the *Evidence (Miscellaneous Provisions) Act 1958* (the '*Evidence (Misc) Act*') must also be considered.

203 Under s 246 of the *CPA*, the starting point is that an accused person must 'attend' their own trial unless excused under s 330.

204 Section 3 of the *CPA* defines 'attend' to mean:

> (a) be physically present in court; or
>
> (b) if authorised or required to do so under Division 2 or 3 of Part IIA of the *Evidence (Miscellaneous Provisions) Act 1958*, appear or be brought before the court by audio visual link or audio link[.]

205 Part IIA div 3 s 42K(2) of the *Evidence (Misc) Act* provides for the appearance of an adult accused before a court other than the Magistrates' Court on a trial:

> (2) Unless a court makes a direction under section 42M(1), an accused, other than a child, being held in custody who is required to appear, or be brought, before a court other than the Magistrates' Court on a trial (apart from the arraignment of the accused) or hearing of a charge, is required to appear, or be brought, physically before the court.

206 Part IIA div 3 s 42M of the *Evidence (Misc) Act* relevantly provides:

> **42M Making of direction for audio visual appearance in section … 42K(2) proceedings**
>
> (1) A court may direct that an accused appear before it by audio visual link in a proceeding in which, by virtue of a provision of … section 42K(2), physical appearance would otherwise be required if it is satisfied, on an application made in accordance with this section, that—
>
> (a) appearance by audio visual link is consistent with the interests of justice; and
>
> (b) is reasonably practicable in the circumstances.
>
> …
>
> (7) A court may … make a direction referred to in subsection (1) on its own initiative at any time in the course of the proceeding to which the direction relates … if the court is satisfied that exceptional circumstances exist.

207 'Exceptional circumstances' is defined in s 3 of the *Evidence (Misc) Act* as including, but not

[53] *Eastman* (1997) 76 FCR 9, 44–5 (van Doussa, O'Loughlin and Cooper JJ); *O'Connell* [2012] WASCA 96, [81], [97], [103]–[104], [138] (Mazza JA, Martin CJ agreeing at [1], Buss JA agreeing at [2]).

limited to, a state of emergency, a pandemic declaration, and a state of disaster.

208 Although the examples of 'exceptional circumstances' in s 3 of the *Evidence (Misc) Act* do not include misbehaviour of the accused, the definition is non-exhaustive and in our view may encompass a situation where that misbehaviour is causing significant disruption to the conduct of the trial, or otherwise threatening to jeopardise the trial.

209 We consider that on each of the three occasions when the judge directed that the accused appear by audiovisual link from the remote witness room, that direction was authorised by s 42M(7) of the *Evidence (Misc) Act*, on the basis of exceptional circumstances. Each direction followed consistent and persistent misbehaviour by the applicant in the face of specific warnings by the judge about the consequences of that misbehaviour.

210 The first occasion followed the termination of the applicant's cross-examination of Mr Dasgupta and the subsequent removal of the applicant from the courtroom, on the sixth day of the trial. When the applicant was returned to the courtroom, the judge told the applicant that she now intended to commence using the remote witness room that she had told the applicant had been set up for use in the event that he disrupted proceedings in the presence of the jury. She said the applicant's behaviour immediately before she had asked for him to be removed 'satisfies me that you will no longer respect and accept the directions I give you in the presence of the jury'. She said she was not prepared to have another outburst like the one that had just occurred, and directed that for the balance of the afternoon, the applicant was to participate in the trial from the witness room.

211 The judge indicated that she would review the position the following morning. She directed the jury that the applicant's removal to a remote witness room was not a punishment of the applicant and that it was to have no bearing on whether they were ultimately satisfied beyond reasonable doubt of his guilt. Very limited evidence was adduced that afternoon. The following morning, the judge permitted the applicant to return to the courtroom.

212 The second time the judge removed the applicant to the remote witness room occurred a considerable way through the cross-examination of the applicant. The applicant's behaviour during his cross-examination was poor. The applicant shouted at, and over, the prosecutor and the judge. He refused to answer various questions, including questions about the identity of his two part-time bookkeepers. On multiple occasions, he attempted to deflect by speaking about the alleged corruption of ASIC that the judge had ruled inadmissible. He complained that everyone had wasted five years of his life. He said he had 'no respect' for the prosecutor and would answer the questions 'as I see fit'. At times, he apologised for his conduct, but at other times he appeared defiant. The cross-examination was halted on multiple occasions and the applicant was removed from the courtroom on multiple occasions. The applicant was given numerous warnings by the judge about his behaviour. He said he did not care if he was removed from the courtroom.

213 At the start of the second day of the applicant's cross-examination, the judge reminded the applicant that if his misbehaviour continued, she would remove him to the remote witness room, and that she would use the mute button to stop him if she considered that he was not answering responsively or controlling himself. She said she would consider using the mute button while the prosecutor was asking questions so that the whole question could be heard and then unmuting to give him the opportunity to answer. She said that as soon as she took the view that the applicant was giving a non-responsive answer, going beyond the question or touching on matters that were inadmissible, flouting or arguing with her rulings or raising his voice, she would mute him again and consider that the applicant had exhausted his right to

give an answer to the question. She would consider at the end of the cross-examination whether to permit re-examination, or whether the applicant had so blatantly disregarded rulings and directions that there was no purpose served in affording any opportunity to re-examine.

214 This is how the applicant responded to these warnings:

> <SAMUEL TRUBNIK TESSA, recalled:
>
> Thank you. Take a seat, please, Mr Tessa.
>
> ACCUSED: Now, before Mr Shaw---
>
> HER HONOUR: No. No, Mr Tessa. This is the time for cross-examination, not---
>
> ACCUSED: I understand that, but I need to clarify---
>
> HER HONOUR: ---no, no Mr Tessa---
>
> ACCUSED: ---what the abbreviations letters are meant on the business card---
>
> HER HONOUR: ---No. No, Mr Tessa. All right, remove him---
>
> ACCUSED: ---GFP means (indistinct) Financial Planning---
>
> HER HONOUR: Mr Tessa, out.
>
> ACCUSED: ---and AFPA---
>
> HER HONOUR: All right, thank you.
>
> ACCUSED: ---meant (indistinct) Financial Planning Accreditation. That's what the abbreviating letters meant---
>
> HER HONOUR: Mr Tessa out---
>
> ACCUSED: ---on the — on the business card. And that I can of course refer to — that of course has been undertaken and taken as part of the compliance---
>
> HER HONOUR: Out.

215 Following this exchange, the judge directed the applicant to participate from the remote witness room, where he remained for the remainder of his cross-examination. At times, the judge muted the applicant while the prosecutor was asking questions. She also muted him, as she had indicated would do, when he was providing non-responsive answers and after occasions when he denigrated the prosecutor by saying things like 'this is an absolutely stupid question', 'you're an idiot and your questions are stupid' and 'can you get this through your thick head'.

216 The final time the judge removed the applicant to the witness room was on the last day of the trial, part way through the applicant's closing address. After permitting the applicant to

address largely uninterrupted for over an hour the previous day (despite the applicant broaching various topics that the judge had earlier ruled to be irrelevant or otherwise inadmissible), the judge ultimately terminated his address. As we have mentioned, the next morning, the judge indicated that she would allow the applicant to continue his address, on condition, among other things, that he identify in advance the topics that he wished to address. When invited to identify those topics, the applicant sought instead to raise a grievance arising from a ruling made the previous day. The judge directed that the applicant give his closing address from the remote witness room.

217 It may be recalled that in *DAJ*, McMurdo P held that the trial judge had erred in removing the accused and continuing in his absence, because although he had created a minor disturbance the evening before, when he was removed in the morning he was not behaving in a way so as to make trial in his presence impracticable.[54] But we agree with the respondent that *DAJ* was a very different case. The applicant in the present case continually misbehaved throughout a 13 day trial. He exhibited a clear intention to continue ignoring and flouting the judge's directions. In the circumstances, it was permissible for the judge to direct that he appear by audiovisual link from the remote witness room on each of the three occasions when this occurred. We also see no error in the judge's decision to mute the applicant at various times given that the applicant was interrupting the prosecutor, seeking to adduce inadmissible evidence and engaging in abuse of the prosecutor.

Consideration of fifth measure: continuation of the trial in the applicant's absence

218 We turn to the fifth measure taken by the judge in response to the applicant's behaviour, namely removing the applicant from the courtroom and permitting the re-examination of Mr Childs to occur in the absence of the applicant. We have explained above the circumstances in which the applicant's cross-examination of Mr Childs was terminated.

219 The respondent does not submit, and we do not consider, that the removal of the applicant from the courtroom prior to the re-examination of Mr Childs constituted 'excusing' the applicant from attendance under s 330(3) of the *CPA*. Such a reading of 'excuse' would give the Court a broad power to remove an accused from the courtroom and proceed in their absence against their wishes. That is not consistent with the fundamental common law right to be present at one's own trial, and it is not 'irresistibl[y] clear[]'[55] from the language of s 330(3) that Parliament intended to abrogate that right. Further, such a reading of 'excuse' would contradict an ordinary connotation of that word, being that the excused person wishes not to be present.

220 However, we accept the respondent's submission that the requirement in ss 246 and 330 of the *CPA* that an accused person attend a criminal trial unless excused cannot be read as an exhaustive code governing an accused's right to be present at trial. Those provisions do not displace the fundamental common law *right* to be present, instead imposing an additional statutory *obligation* to be present.[56] An accused person can be released from the obligation imposed by s 246 by an exercise of the power in s 330(3). But such release does not negate the accused's *right* to be present, which subsists at common law.

54 [2005] QCA 40, [6].

55 *Brophy v Western Australia* (1990) 171 CLR 1, 17–18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); [1990] HCA 24.

56 See, eg, *DPP v Smith* [2023] VSCA 293, [36] (Priest JA, Emerton P agreeing at [1], Macaulay JA agreeing at [62]), where s 246 of the *CPA* was characterised as imposing an obligation. See also *DPP v Smith* [2024] HCA 32, [71] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), [149] (Edelman J).

221 The question is whether, by his conduct, the applicant waived, or should be taken to have waived, his right to be present for the re-examination of Mr Childs. As the cases discussed above demonstrate, an accused person will be taken to have waived their right to be present at trial where their misbehaviour makes their trial impossible, and is intended to have that effect.[57]

222 As to the circumstances in which continuation of a trial may be said to be 'impossible', a more raucous, violent or persistent accused may always be postulated. Although some situations may make the continuation of trial more difficult than others, all may be situations in which the continuation may fairly be said to be 'impossible' unless the accused is removed. This may be seen in the range of circumstances in which the accused person was *not* removed (until they misbehaved in a more extreme way) in cases such as *Vernell*,[58] *Eastman*,[59] and *O'Connell*.[60] It is also supported by *Vernell*, where it appears Martin and O'Bryan JJ considered it was permissible for the judge to remove the accused and continue in his absence if his behaviour made the trial 'extremely difficult'.[61]

223 Here, we consider that there was no error in the trial judge taking the applicant, by his conduct, to have waived his right to be present for the re-examination of Mr Childs. It appears that following the termination of the applicant's cross-examination of Mr Childs, the judge originally intended to allow the applicant to remain for his re-examination. After the prosecutor indicated that he wished to re-examine, the judge told the applicant to 'take a seat'. It was at this point that the applicant said 'Mr Childs — Mr Childs, you're a fraud and dishonest at that'. The judge then directed his removal and invited the prosecution to re-examine in the applicant's absence, indicating that he would be provided with a transcript. It will be recalled that this was a course that the judge had foreshadowed to the applicant in the 'ground rules'.

224 In circumstances where the applicant had conducted his cross-examination of Mr Childs in the manner we have described above, and had shown no capacity or willingness to control his inflammatory outbursts directed to Mr Childs, we see no error in the judge taking the applicant to have waived his right to be present during Mr Childs' re-examination.

225 We note that the re-examination of Mr Childs was limited. The prosecutor asked Mr Childs only two questions. The first was why Mr Childs had decided, by 16 November 2006, not to take his investigation of the applicant any further. Mr Childs said that he had reviewed ASIC records, which indicated that the investigation was closed without further action because ASIC could not identify any clients who were being given insurance at that time and records suggested that the applicant's business was only deriving rental income.

226 The second question was whether beyond these matters, there was any other reason why the investigation had gone no further. Mr Childs said he could not recollect any further reason and had not seen any in the ASIC records.

57 This approach is consistent with that taken in *Eastman* (1997) 76 FCR 9, 43–4, where von Doussa, O'Loughlin and Cooper JJ said the correctness of the trial judge's decision to remove the accused to a separate room with audiovisual link was 'to be tested by [the] statements of principle' in *Vernell* [1953] VLR 590 and *McHardie* [1983] 2 NSWLR 733. In those decisions, it was said that if the accused person's behaviour rendered trial impossible, and was intended to have that effect, then they could be removed.

58 [1953] VLR 590.

59 (1997) 76 FCR 9.

60 [2012] WASCA 96.

61 [1953] VLR 590, 597.

227 The answers to these questions did not feature in the prosecutor's closing address and did not otherwise form part of the prosecution case. We were informed by the respondent that the prosecution did not originally intend to call evidence from Mr Childs. The decision to call Mr Childs was made after the applicant, in the face of the warnings from the judge about potential prejudice to his defence that we have referred to above,[62] elected to introduce evidence of the investigation conducted by Mr Childs in 2006. The evidence given by Mr Childs in response to these questions rebutted the applicant's contention that the reason the 2006 investigation had been discontinued was because he had applied for an AFSL in October 2006. Having received the transcript of Mr Childs' answers to these questions, the applicant did not apply to have Mr Childs recalled or otherwise seek to have the matter taken any further.

228 The circumstances in which an accused person will be taken to have intentionally rendered it 'impossible' for the re-examination of a witness to proceed in their presence, and therefore to have waived their right to be present for that re-examination, will be rare. However we consider that in the particular circumstances of this case, no error or irregularity arose from the judge's treatment of the applicant, by his behaviour, as having done so. In reaching this conclusion, it is relevant that the applicant had been warned that this was a potential consequence of his misbehaviour, and persisted in that misbehaviour in the face of those warnings; that he was provided with a transcript of the evidence adduced in the re-examination of the witness; that the re-examination of the witness was limited and was ultimately not relied on as part of the prosecution case; and that the jury was told that the applicant's misbehaviour (and the judge's response to that behaviour) was not relevant to the adjudication of the charges.

Consideration of sixth measure: termination of applicant's evidence in re-examination

229 The sixth measure taken by the judge in response to the applicant's behaviour was terminating the applicant's evidence in re-examination, such that he was ultimately not able to give any evidence in re-examination.

230 As we have indicated above, the judge told the applicant that she would consider at the end of his cross-examination whether to permit re-examination, or whether the applicant had so blatantly disregarded rulings and directions that there was no purpose served in affording him any opportunity to re-examine.

231 After terminating the cross-examination of the applicant, the judge invited submissions from the prosecution on whether the applicant should have the right to re-examine, given the way he had answered questions during his cross-examination and that he had taken 'ample advantage of opportunities to clarify matters that arose in cross-examination'.

232 The prosecutor submitted that as a matter of fairness the applicant ought be allowed to give evidence in what was effectively re-examination, as long as it was confined to matters that had arisen in cross-examination and which required clarification.

233 The judge accepted this submission. She warned the applicant to confine himself to clarifying matters that had arisen from his cross-examination. Having received this warning, the applicant commenced by asking why he had not been given 'the same opportunity … to cross-examine' Ms Jones, and accused the judge of bullying him. The judge warned the applicant that if he continued to argue with her about 'the Linda Jones ruling', she would take

[62] See [110] above.

it that he had forgone his right to deal with any matters in re-examination and that would be the end of his evidence. In response, the applicant accused the judge of 'running double standards'. The judge announced that she would take it that the applicant had forgone his right to re-examination and his evidence was concluded.

234 We pause to note that the applicant had been allowed to cross-examine Ms Jones. At the completion of the applicant's cross-examination, the prosecutor said he had no re-examination for Ms Jones. The judge had then warned the applicant that he had failed in his cross-examination to put to Ms Jones that he had never spoken to her to request a refund of his AFSL application fee, and that if wished to advance that contention as part of his case, he would first have to put it to Ms Jones. The judge offered him an opportunity to do so, which he took. The prosecutor then exercised his right to re-examine the witness. It appears that the applicant, wrongly, took this re-examination to be further cross-examination, and formed the belief that he too should be allowed to engage in further cross-examination of the witness, which the judge did not permit.

235 We are satisfied that the applicant's conduct when invited to give evidence in re- examination demonstrated an intention to continue ignoring the judge's directions. The applicant was warned that if he continued in that course of conduct he would be taken as having waived his right to give further evidence. By so continuing, he was taken to have waived his right.

Consideration of seventh measure: constraining the applicant's addresses

236 The final measure taken by the judge in response to the applicant's behaviour was cutting short the applicant's opening address and placing conditions on the continuation of his closing address. We are satisfied that each of these actions was authorised by the *CPA*, and, in the circumstances, appropriate.

237 Prior to commencing his opening address, the judge warned the applicant that the defence opening was 'not the opportunity to give evidence'. During his opening address, the judge warned the applicant six times to confine himself to identifying the acts, facts, matters and circumstances with which he took issue.

238 Notwithstanding these warnings, the applicant persisted in giving evidence and making arguments in his opening address. After he had addressed the jury for over an hour, the judge warned the applicant that he was 'repeating [him]self' and was again 'going into argument'. She told him that she was going to put a time limit on the remainder of his opening address. The applicant responded by continuing his address as follows:

> ACCUSED: Now, my solicitor has provided a written statement and response to those charges, both to the court and both to the Public Prosecution, basically stating there is basically no proof, and---
>
> HER HONOUR: Mr Tessa. Mr Tessa---
>
> ACCUSED: ---the prosecution has failed---
>
> HER HONOUR: Mr Tessa, stop.
>
> ACCUSED: ---to prove that there is a deception.
>
> HER HONOUR: All right. Thank you. That's the end of your address.

ACCUSED: I've got a couple more things. I'll be brief.

HER HONOUR: No. You've continued to flout my ruling. I gave you a warning and a direction. That's the end.

239 Prior to commencing his closing address, the judge reminded the applicant of the rulings she had made about relevance and admissibility, which she said applied to his closing address as much as they had to the applicant's questioning of witnesses and giving of evidence. She told the applicant that if he flouted these rulings and sought to address the jury about matters that had been ruled to not be relevant and admissible, she would stop him. If he continued to do so, she would take it that he had foregone his right to continue the address.

240 Although the applicant did not heed this warning in his closing address, the judge gave him significant latitude. The applicant was not interrupted when he addressed matters he knew to be inadmissible, such as a statutory declaration that he had assets exceeding $5 million to cover claims; and an allegation that ASIC was not approving AFSL applications in order to 'eliminat[e] the competition to create a monopoly'.

241 As we have indicated above, the judge permitted the applicant to address the jury for over an hour, largely uninterrupted. Eventually, the judge stopped the applicant's closing address and gave him a warning when, in the course of contending that it was ASIC's policy that a refund had to be 'done by paper', he referred to an ASIC policy document which had been excluded from evidence.[63] Shortly thereafter, the judge announced that the applicant had forgone the right to continue his address and adjourned the proceeding for the day.

242 As we have also indicated above, the following day the judge relented and allowed the applicant to finish his closing address on certain conditions. The conditions were as follows:

(1) The applicant was to identify in advance the topics he proposed to cover.

(2) If the judge considered that any of the identified topics were outside the proper scope of closing address, the applicant was not to address them.

(3) If the applicant went outside the identified topics, he would be directed to stop.

(4) The applicant had 15 minutes to finish his closing address.[64]

(5) The remainder of the closing address be given from the remote witness room.

243 We consider that the conditioning of the applicant's closing address was, in all the circumstances, justified.

244 In summary, we are satisfied that none of the measures taken by the judge throughout the trial in response to the applicant's behaviour resulted in an error or irregularity in the trial. If we are wrong about that and one or more of the measures resulted in an error or irregularity that was nonetheless not a 'serious departure from the prescribed processes for trial',[65] then we are satisfied that the measures could not have made any difference to the outcome of the trial. None of the measures would have left the jury in any doubt about the nature of the applicant's

63 The document had been excluded because it was unclear to what time period it pertained.

64 The judge was expressly authorised by s 235(2) of the *CPA* to limit the length of the applicant's closing address.

65 *Baini v The Queen* (2012) 246 CLR 469, 479 [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [2012] HCA 59 ('*Baini*').

defence. The prosecution case was overwhelming and the applicant's conviction was inevitable.[66]

245 The applicant's contentions on issue (f) therefore fail.

Application for leave to appeal against sentence

246 We turn to the application for leave to appeal against sentence.

247 The applicant was sentenced as follows:

Charge	**Offence**	**Maximum**	**Sentence**	**Cumulation**
1	Obtain property by deception	10 years' imprisonment	18 months' imprisonment	Base
2	Obtain a financial advantage by deception	10 years' imprisonment	2 months' imprisonment	Nil
3	Obtain a financial advantage by deception	10 years' imprisonment	2 months' imprisonment	Nil
4	Obtain property by deception	10 years' imprisonment	18 months' imprisonment	4 months
5	Obtain property by deception	10 years' imprisonment	18 months' imprisonment	4 months
6	Obtain property by deception	10 years' imprisonment	18 months' imprisonment	4 months
7	Obtain property by deception	10 years' imprisonment	18 months' imprisonment	4 months
Total effective sentence:		2 years 10 months' imprisonment		
Non-parole period:		1 year 8 months' imprisonment		
Pre-sentence detention declaration:		Nil		

The sentencing remarks

248 The judge described the evidence that the applicant did not hold an AFSL, and did not believe he held one, as overwhelming. The evidence came from contemporaneous records made by a

66 *Baini* (2012) 246 CLR 469, 480–2 [28]–[33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [2012] HCA 59.

number of ASIC officers of their dealings with the applicant and from other regulatory bodies. It was confirmed by documents found at the applicant's house when a search warrant was executed. There was no evidence to support the applicant's claims of a conspiracy or cover up.

249 The objective gravity of the offending, and the applicant's culpability and degree of responsibility for it, were all high. He was the architect and sole operator of a fake insurance scheme, and personally received and benefited from the money obtained as a result of the offending.

250 The offending did not consist of a single transaction, or transactions covering a relatively short period of time. The charges spanned six years. The applicant visited the businesses of the complainants at least twice a year, sometimes more frequently, and on each occasion collected payments and falsely represented that he was providing them with insurance. Documents were produced each time to provide an appearance of authenticity. The scheme was crude, yet sophisticated.

251 Although the total amount obtained by the applicant might be said to be relatively low compared to other frauds dealt with by the County Court, the sums were substantial to each of the complainants. The risks to which they were each exposed were considerable. Each operated a business of a high risk nature on tight margins. Following the denial of their claims, Mr Hanna and Mr Cakular were either unable to operate their businesses for some time or were only able to operate at a significantly reduced level. The offending breached the trust of each complainant. It exploited their desire to obtain low cost insurance to protect their livelihoods.

252 The applicant's prospects of rehabilitation were poor. He had demonstrated a disregard for the integrity of the system of regulation of the insurance industry. He had previously committed relatively minor offences of deception, but maintained his innocence of all prior matters.

253 The applicant provided daily care to his elderly mother, who lived nearby. He also supported his son, who was a fulltime university student living at home. However, these circumstances fell well short of the threshold required for family hardship to be taken into account as a mitigating factor.

254 Other factors were mitigatory and moderated the sentence that was otherwise appropriate. The trial judge assumed in the applicant's favour that he might suffer additional stress as a result of the possibility that ASIC might make an order that he pay the whole of the expenses of their investigation, which were specified to be $124,583.36. The extended time that the charges had been 'hanging over [the applicant's] head' was also taken into account, including as a result of an earlier jury being discharged without verdict after three weeks of evidence due to irrelevant prejudicial material being placed before them. The impact of COVID on persons sentenced was also taken into account.

Proposed grounds of appeal

255 The application for leave to appeal against sentence advances two proposed grounds of appeal:

> a. There is a mistake, as 14 month of the entire 34 month sentence was a concurrent period, and the total sentencing period should be readjusted to 20 month.

b. The entire sentence is wrong, as the charges are wrong from their origin and the trial was unfair and unjust.

256 The applicant's contention on the first proposed ground appears to be that the four month component of each of the 18 month sentences imposed on charges 4, 5, 6 and 7 that the judge ordered to be served cumulatively upon each other and on the sentence imposed on charge 1 (a total of 16 months cumulation) should have been deducted from the total effective sentence of 34 months' imprisonment.[67] That contention misunderstands the sentencing process.

257 Section 16(1) of the *Sentencing Act 1991* relevantly provides:

> **16 Sentences—whether concurrent or cumulative**
>
> (1) … every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment … imposed on that person … .

258 Thus, once the judge imposed sentences of 18 months, 2 months, 2 months, 18 months, 18 months, 18 months and 18 months on charges 1, 2, 3, 4, 5, 6 and 7 respectively, the starting point was that the applicant would serve each of those sentences concurrently, resulting in a total effective sentence of 18 months.

259 However, the words 'unless otherwise directed by the court' in s 16(1) of the *Sentencing Act* give the Court the power to order cumulation. The judge ordered that 18 months of the sentence on charge 1, and 4 months of the sentence on each of charges 4, 5, 6 and 7 be served cumulatively upon each other. That resulted in a total effective sentence of 34 months, or 2 years and 10 months.

260 There was no error in the calculation of the applicant's sentence. The applicant's first proposed ground is without merit.

261 The applicant's contention on the second proposed ground depends on the application for leave to appeal against conviction, which fails for the reasons we have stated. Accordingly, the applicant's second proposed ground is without merit.

262 Although not advanced in his application for leave to appeal against sentence, in oral submissions, the applicant made complaints about three passages in the judge's sentencing remarks.

263 In the first impugned passage, the judge said the applicant was not an insurance broker:

> You did not hold a AFSL, a requirement for those providing financial services, including providing or arranging insurance. **You were not an insurance broker, an underwriter or an insurer.** Nor were Review Financial Services or Eastern Profits Pty Ltd. By law, individuals cannot operate as insurers. Only corporations can be licensed as insurers. You could not have been licensed as an insurer in your own right. Nor could Review Financial Services, it was not a company. Eastern Profits Pty Ltd was not licensed and had never applied to be licensed as an insurer. No company associated with

67 We assume the figure '14 months' in the applicant's application for leave to appeal against sentence is an arithmetical error.

> you had ever applied to be licensed as an insurer. It follows, neither you, nor any company associated with you, had ever provided proof, as is required from a licensed insurer, that you satisfied the prudential requirements for providing insurance. You had no reserves or underwriting arrangements on which to call to meet any claim for an insurable event, whether it be a relatively small amount, for example, for replacement of stolen tools of trade, or up to $5 million or $10 million to satisfy a public liability claim.[68]

264 The applicant says the emphasised sentence is erroneous because he never purported to be an insurance broker. Rather, he always practiced as, and intended to practice as, an insurer.

265 In the second impugned passage, the judge said:

> The behaviour involved a cold call walk in to a small automotive business in an industrial estate, production by you of a business card bearing your name and the names of Review Financial Services and Eastern Profits Pty Ltd. On those cards and in your verbal introductions, you gave yourself, RFS and Eastern Profits Pty Ltd, various descriptions. For yourself, senior consultant, or senior adviser. For RFS, general broker, or general brokers. At one stage, you appended the letters DFP/AFPA to your name. **You invented a brokers licence or registration number for Review Financial Services and appended that to its name on the business card.**[69]

266 The applicant says the emphasised sentence is erroneous because the number appended to 'Review Financial Services' on his business card was not an invention — it was the business name registration number of Review Financial Services.

267 There was no error in the judge saying that the applicant had invented a broker's licence or registration number. The business cards he gave to Messrs Hanna, Naughten and Cakular read:

> General Brokers Reg.No' 1239483H.

268 It matters not that the number '1239483H' happened to be the business name registration number of Review Financial Services. What matters is that by juxtaposing the number '1239483H' and the words 'General Brokers Reg.No'', the business card was apt to convey that '1239483H' was a general broker's registration number. The applicant did not have a general broker's registration number. As the judge said, he invented one.

269 Messrs Atesh, Harrison, Naughten and Cakular each gave evidence that the applicant had represented that he was an insurance broker. Further, when the applicant was confronted in cross-examination with the business cards, he gave evidence that he believed he had been registered as a general broker since 2006:

> Under Review Financial it says, 'General broker's registration number'?---That's right.
>
> And there's a number there?---Yeah. Now, that number---
>
> Just wait for the question, please. I'm just going to ask you some

68 *DPP v Tessa* [2023] VCC 501, [4] (emphasis added) ('Reasons').
69 Reasons, [8] (emphasis added).

> questions. Do you say that at the time you gave this to Mr Naughten, you were registered as a general broker? Is that right? Yes or no?---I assumed that I was because I provided all the documents to ASIC. That's right. And this number---
>
> When were you first registered as a general broker?---Sorry?
>
> In what year were you first registered as a general broker?---This is what I applied for in 2006 and that was my understanding.

270 The document that the applicant produced at trial and asserted to be a copy of the AFSL application he had submitted to ASIC on 12 October 2006, also recorded that he intended to practice as an insurance broker.

271 In his closing address, the applicant denied that he was a broker or that he had intended to be a broker. He attempted (unconvincingly) to explain away his use of the word 'broker' in the document that he said was his AFSL application by suggesting that the word 'broker' had a special meaning in Russian, namely, someone of senior standing in a particular profession.

272 In circumstances where the evidence was that the applicant had applied for an insurance broker's licence, and had represented to his victims that he was an insurance broker, there was nothing erroneous about the judge observing, for completeness, that 'You were not an insurance broker, an underwriter or an insurer'.[70] The complaint also ignores the context in which that sentence appears — in a paragraph otherwise devoted to recording that the applicant had never applied to be an insurer, and was not an insurer.

273 The final impugned passage in the judge's sentencing remarks is as follows:

> Again, to each of [Messrs Harrison, Naughten, Hanna and Cakular], the subject of Charges 4, 5, 6 and 7, **you offered to provide insurance at a lower rate than their existing cover** or other offers being considered by them, or in circumstances where they had been refused insurance because of the level of their risk.[71]

274 The applicant says the emphasised words are erroneous because Mr Harrison's insurance 'premium' with Review Financial Services was higher than it was with Mr Harrison's previous insurer. The complaint is without merit. The judge, in the same sentence, said 'or in circumstances where they had been refused insurance because of the level of their risk'. Mr Harrison's evidence was that he had previously been refused insurance because of the level of his risk.

Conclusion

275 On the application for leave to appeal against conviction, we will grant leave to appeal but dismiss the appeal.

276 On the application for leave to appeal against sentence, we will refuse leave to appeal.

70 Reasons, [4].

71 Reasons, [8] (emphasis added).